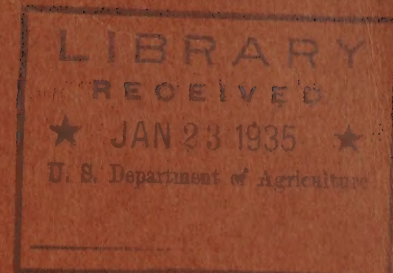


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COMPILATION OF OPINIONS  
OF THE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

VOLUME I

Opinion Nos. 1 to 50; September 28, 1933, to June 9, 1934.

Opinion Section,  
Office of the General Counsel,  
Agricultural Adjustment Administration.







C O N T E N T S

	Page
PREFACE	IX
TABLE OF CORRESPONDING OPINION SECTION MEMORANDUM NUMBERS	X
OPINIONS OF AGRICULTURAL ADJUSTMENT ADMINISTRATION	
No.	
1 Cotton Option Contracts--Rights of Lienholders . . . . .	1
2 Authority to Adjust Government Contracts . . . . .	17
3 Bonds of Treasurers of County Wheat Production Control Associations . . . . .	23
4 Contracts for Removal of Surplus . . . . .	33
5 Injunctive Relief to Restrain Violations of License . . . . .	45
6 Marketing Agreement for Cotton Ginners . . . . .	51
7 Import Restrictions in Relation to Marketing Agreements . . . . .	59
8 Application of Section 3(e) of the National Industrial Re- covery Act to Imports from Hawaii and from the Philippines . . . . .	65
9 National Industrial Recovery Act Codes--Application to Hawaii, Alaska, Puerto Rico, etc. . . . .	73
10 Members of Congress as Parties to Benefit Contracts . . . . .	77
11 Scope of the Term "Agricultural Products". . . . .	85
12 Turpentine Gum (Naval Stores) under the Agricultural Adjustment Act . . . . .	91
13 Rate of Payment for Publication of Reports of Crop Control Associations . . . . .	97
14 Inclusion of Baking Powder in Terms of Executive Order No. 6345 . . . . .	103
15 Right to Trial de Novo after Revocation of License . . . . .	109
16 Effect of Licenses on Pre-existing Contracts of Municipal Agencies . . . . .	119

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# CONTENTS--(Cont'd)

No.		Page
17	Construction of Phrase "Not in Conflict with Existing Acts of Congress" in Section 8(3) of the Agricultural Adjustment Act . . . . .	125
18	Garnishment of Benefit Payment Checks in Hands of County Agents . . . . .	133
19	Findings under Section 15(d) of the Agricultural Adjustment Act . . . . .	143
20	Licensing of Production Credit Agencies . . . . .	159
21	Licensing to Require Use of Domestic Fats and Oils . . . . .	163
22	Issuance of License in Absence of Marketing Agreement . . . . .	171
23	Licensing of Producers . . . . .	177
24	Reduction of Processing Tax under Section 15(a) of the Agricultural Adjustment Act . . . . .	185
25	Application of National Industrial Recovery Act Codes to Certain Employers. . . . .	195
26	Prohibition of Shipment of Low Grade Commodities . . . . .	209
27	Fiscal Practice--Special Fund or Deposit Accounts . . . . .	213
28	Salary of Market Administrator under Milk License . . . . .	235
29	Construction of Superfluous Word in Milk License . . . . .	245
30	Power of Acting Secretary of Agriculture . . . . .	251
31	Admissibility in Evidence of Licenses and Marketing Agreements . . . . .	259
32	Reindeer and Reindeer Meat . . . . .	267
33	Construction of Term "Shipments upon Consignment" in Code of Fair Competition . . . . .	271
34	Evidence--Statistical Material and Testimony of Experts of the Department of Agriculture . . . . .	277
35	Suits by Control Committee and Market Administrator . . . . .	289
36	Bankhead Act Allotments to State Institutions . . . . .	299
37	Transfer of Funds to Federal Trade Commission for Milk Investigation . . . . .	303







# CONTENTS-Cont'd)

No.		Page
38	Allotments under Bankhead Act--Long Staple Cotton . . . . .	313
39	Removal of Surplus . . . . .	321
40	Certification of Evidence at Proceeding for Ratification of License . . . . .	329
41	Benefit Payment without Reduction of Production . . . . .	337
42	Guarantee of Loan for Export of Cotton . . . . .	343
43	Designation of Agent to Administer Oaths . . . . .	349
44	Appointment of Governor to Allot the Sugar Quota for Puerto Rico . . . . .	353
45	Power to Enforce Performance by Trustees of Parties to Reduction Contracts . . . . .	359
46	Status of Signers of Marketing Agreement . . . . .	365
47	Basis of Sugar Quotas under Agricultural Adjustment Act, as Amended . . . . .	369
48	Rules of Evidence in Administrative Proceedings . . . . .	381
49	Inclusion of "Short Pima" Cotton in Allotments under Bankhead Act . . . . .	393
50	Importation of Direct-Consumption Sugar . . . . .	399
51	Appropriation for Removal of Surplus Dairy Products . . . . .	403
52	Proceeds from Sale of Cattle . . . . .	411
53	Authentication of Official Documents or Records . . . . .	417
54	Effect of Failure of Market Administrator to Give Bond . . . . .	425
55	Demurrage Charges on Export Wheat . . . . .	433
56	Agreement not to Sell to Persons not Parties to Marketing Agreement . . . . .	443
57	Marketing Agreements with Producers . . . . .	451
58	Termination of Marketing Agreement Providing for a Trust Fund . . . . .	455
59	Purchase of Corn for Drought Relief Purposes . . . . .	465







# CONTENTS--(Cont'd)

No.		Page
60	Contract by Government Agent in Excess of Authority. . . . .	473
61	Agricultural Adjustment Act and Amendatory Measures as Revenue Legislation . . . . .	483
62	Cotton Option-Benefit Contracts--Producer Fraudulently Securing Consent of Share Croppers. . . . .	493
63	Authority of Agents of the Department of Agriculture to Administer Oaths . . . . .	513
64	Restrictions on Sugar Imported from Cuba . . . . .	519
65	Appointment of Administrators for Hawaii and Puerto Rico . . .	523
66	Proceeds of Tax on Cuban Sugar . . . . .	533
67	Purchase of Rum Distilleries in the Virgin Islands . . . . .	537
68	Restrictions upon Sugar Entering in Excess of Quotas . . . . .	541
69	Elevators Subject to Country Grain Elevator Code . . . . .	547
70	Use of Audits of Books of Milk Distributors . . . . .	555
71	Filing of Cross Bills in the Federal Courts . . . . .	563
72	Appointment of Bureau of Agricultural Economics as Agent of the Secretary . . . . .	577
73	Cotton Option-Benefit Contracts--Remedies to Protect Interests of Sharecroppers . . . . .	583
74	Necessity for Bids in Purchases for Emergency Program . . . . .	623
75	Return of Tobacco Acreage Reduction Contracts . . . . .	629
76	Use of Funds to Defray Expenses under Superseded License . . .	633
77	Employment of the Puerto Rico Company as Agent of the Secretary . . . . .	641
78	Restrictions upon the Importation of Rye . . . . .	647
79	Use of Funds for Land Policy Section . . . . .	657
80	Emergency Appropriation Act Expenditures for Flood Relief . .	661
81	Operation of the Puerto Rico Company . : . . .	669
82	Automobile Transportation and Automobile Purchase . . . . .	675





# CONTENTS--(Cont'd)

No.		Page
83	Benefit Payment to Insane Payee . . . . .	689
84	Use of Tax Payment Warrants under Kerr Tobacco Act . . . . .	695
85	County Allotments under Bankhead Act . . . . .	701
86	Restrictions upon Imported Sugar to be Exported after Processing . . . . .	707
87	Conditioning of Sugar Allotments upon Prices Paid Producer . .	713
88	Application of Section 213 (47 Stat., c. 314; 5 U.S.C.A., 35a) to Appointments under the Agricultural Adjustment Act . .	721
89	Exemption of Existing Sugar Stocks from Bankhead Act Quotas. .	725
90	Federal Tax on Checks upon Funds of Market Administrator . . .	735
91	Legality of Advertising Methods under Omaha Milk License . . .	743
92	Production Control Associations not Subject to State Compensation Laws . . . . .	747
93	Termination of Marketing Agreement for Southern Rice Milling Industry--Refund to Control Committee . . , . .	757
94	Meaning of "Accredited General Sales Agent" . . . . .	763
95	Member of a County Allotment Committee not an Officer of the United States . . . . .	773
96	Marketing Agreements and Licenses--Buyers of Flue-Cured Tobacco . . . . .	783
97	Proceeds of Tax on Processing in the United States of Philippine Sugar--Proceeds of Compensating Taxes on Philippine Sugar . . . . .	791
98	Sugar Imported in Excess of 1934 Quotas . , . . .	799
99	Funds for Emergency Cattle Program . . . . .	803
100	Determination of "Parity" under the Agricultural Adjustment Act . . . . .	815
101	Processing Tax Problems with Respect to 1935 Program . . . . .	819
102	Action to Compel Licensees to Furnish Information . . . . .	825





# CONTENTS--(Cont'd)

No.		Page
103	Storage Charges on Export Wheat . . . . .	837
104	Advances for Expenses of Market Administrator . . . . .	843
105	Employment of Special Attorneys by Agricultural Adjustment Administration . . . . .	851
106	Duration of Kerr Tobacco Act . . . . .	869
107	Use of Jones-Connally Act Funds in Porto Rico, Alaska, and Hawaii . . . . .	875
108	Exchange of Cattle Purchased in Drought Areas . . . . .	879
109	Benefit Payments for Crop Substitution or Reduction of Total Crop Area . . . . .	895
110	Breach by Landlord of Cotton Acreage Reduction Contract when Managing Share Tenant Performs in Full . . . . .	901
111	Sphagnum Moss as an "Agricultural Commodity" . . . . .	913
112	Variation of Payments under 1935 Cotton Acreage Reduction Contracts . . . . .	917
113	Delegation of Authority to Terminate Contracts . . . . .	923
114	Use of Jones-Connally (Cattle) Act Funds for Processing for Relief Purposes . . . . .	933
115	Setting up Reserve Fund under Milk License . . . . .	939
116	Proceedings for Revocation of License for Violations Prior to Transfer of Business . . . . .	943
117	Breach by Other Signatories as Defense to an Action upon Marketing Agreement . . . . .	969
118	Purchase of Various Commodities for Relief Distribution . . . . .	983
119	Effect of Licenses upon Pre-Existing Contracts . . . . .	993
120	Rights of Tobacco Demonstrators under Flue-Cured Tobacco Adjustment Contracts . . . . .	1007
121	Authority of Secretary of Agriculture to Delegate Powers in the Absence of Express Statutory Authority . . . . .	1015
122	Licensing Importers for Benefit of Domestic Producers . . . . .	1029





# CONTENTS--(Cont'd)

No.		Page
123	Records to be Furnished under Section 8 of Federal Trade Commission Act . . . . .	1033
124	Necessity for Bids in Purchase of Cattle for Relief Purposes . . . . .	1043
125	Bankhead Act--Tax Exemption Certificates . . . . .	1051
126	Termination of Article VIII of Marketing Agreement for Southern Rice Industry . . . . .	1055
127	Benefit Payments for Hogs on Basis of Domestic Allotment . . .	1067
128	Hog Production Program for Producers of Hogs or of Corn and Hogs . . . . .	1073
129	Prohibitive Restrictions upon Imported Butter . . . . .	1081
130	Application of Federal Employees' Compensation Act to Employees of Market Administrator . . . . .	1087
131	Payment to Owners under Cotton Acreage Reduction Contracts when Managing Share Tenant Fails to Perform . . . . .	1097
132	Purchase for Relief Purposes of Sugar Surplus in Puerto Rico, etc. . . . .	1103
133	Application of Emergency Cattle Agreement to Lienholders Foreclosing after April 1, 1934 . . . . .	1111
134	Purchase of Cattle from the Regional Agricultural Credit Corporation . . . . .	1115
135	Termination of Tax under Bankhead Act . . . . .	1121
136	Enforcement of Promises Made by Producers in Exchange for the Consent of Tenants and Share Croppers . . . . .	1131
137	Procedure when Benefit Payments Have Been Made to Wrong Payee . . . . .	1139
138	Furnishing of Official Information by Market Administrator . .	1145
139	Abrogation of Contracts by 1934 Philippine Sugar Allotment . .	1151
140	Certificate of Compliance with Milk License . . . . .	1161
141	Forfeiture of Sugar Allotments . . . . .	1167
142	Funds Available for Soil Survey of Puerto Rico . . . . .	1173





# CONTENTS--(Cont'd)

APPENDIX No.		Appendix Page
A-1	Propriety of Appointment under the Agricultural Adjustment Act Opinion of the Attorney General, dated May 19, 1933.....	3
A-2	Set-Off Against Benefit Payments of Debts Due the United States Opinion of the Attorney General, dated August 8, 1933....	11
A-3	Application of National Industrial Recovery Act to the Philippines Opinion of the Attorney General, dated December 2, 1933..	17
A-4	Contracts with Members of Congress under Agricultural Adjustment Act Opinion of the Attorney General, dated December 16, 1933.	23
A-5	Computation of Quota of Tax Exempt Short Staple Cotton Opinion of the Attorney General, dated May 23, 1934.....	31
A-6	Application of National Industrial Recovery Act to Puerto Rico, Hawaii and Alaska Opinion of the Attorney General, dated June 7, 1934.....	37
A-7	Federal Tax on Checks upon Funds of Market Administrator Ruling of the Commissioner of Internal Revenue dated September 18, 1934.....	43
A-8	Corporation to Aid in Economic Rehabilitation of Puerto Rico Opinion of the Attorney General, dated September 19, 1934.	47
A-9	Termination of Tax under Bankhead Act Opinion of the Attorney General, dated September 22, 1934.	53





## P R E F A C E

The object of this Compilation is to bring together for convenient reference the opinions of official legal advisors upon questions arising in connection with the administration of the Agricultural Adjustment Act and related statutes. The opinions included are, in the main, the work of the Opinion Section, (originally called the Brief and Opinion Section) which was organized in October, 1933, as a part of the Office of the General Counsel of the Agricultural Adjustment Administration. The Compilation, however, does not contain all the memoranda of law prepared by the Opinion Section. Some opinions, transmitted as officially approved to those who requested them, have been omitted because involving points of no general interest. Numerous others, dealing with points of major concern, were never finally approved because the occasion which prompted their preparation failed in the end to require an official opinion. These also have been omitted.

The omitted opinions are retained in the files of the Opinion Section under their original Opinion Section numbering, which is not strictly chronological, as is the new numbering system adopted for the purpose of this Compilation. A table showing the original numbering and the corresponding numbering in this Compilation follows this Preface.

References to pages appearing in the body of these opinions are to page numbers of the opinions as originally written, and do not correspond to the paging of this Compilation. Also, internal references to Opinion Numbers refer to Opinion Section Memorandum Numbers, a table of which follows this Preface.

Certain closely related opinions of the Attorney General and a ruling of the Commissioner of Internal Revenue have been embodied in an Appendix.





# T A B L E

## Opinion Section Memorandum Numbers

Op.Sec. Memo.No.	Compila- tion No.	Op. Sec. Memo. No.	Compila- tion No.	Op.Sec. Memo.No.	Compila- tion No.	Op.Sec. Memo.No.	Compila- tion No.
1	3	76	37	118	81		
5	4	77	38	119	82	160	107
3a & 6b	8	78	42	120	80	162	113
6d	7	80	43	122	83	164	114
8	6	81	46	123	54	165	115
9	2	83	47	124	41	166	112
13	1	84	50	125	48	167	116
14	9	85	51	127	84	168	117
16	10	86	52	128	72	169	118
17	11	87	53	129	85	171	95
18a	12	88	56	131	86	172	122
19	13	89	57	132	88	174	123
20	14	90	58	133	91	175	124
21	15	91	30	134	87	176	125
22	16	92	45	135	40	177	126
23	18	96	59	136	90	178	61
24	5	97	60	137	68	179	127
29	19	98	62	138	49	180	128
31	17	98A	73	139	92	181	132
32	20	100	55	140	94	182	129
36	22	101	63	141	96	183	130
38	24	102	64	142	98	184	131
43	21	103	97	143	99	185	134
44	28	104	66	144	93	187	133
45	25	106	67	145	100	188	119
52	26	107 & 107A	69	146	101	189	121
56	23	108	70	147	102	190	136
57	27	109	44	148	103	192	120
62	29	110	71	150	89	194	137
64	32	111	75	151	106	195	138
66	33	112	76	152	104	196	139
67	36	113	77	153	105	197	140
68	34	114	65	154	109	198	141
70	31	115	78	155	110	199	135
71	39	116	79	156	111	200	142
74	35	117	74	157	108		





No. 1

COTTON OPTION CONTRACTS - RIGHTS OF LIENHOLDERS

Cotton Option Contracts executed under the authority of Sections 6 and 7 of the Agricultural Adjustment Act should not include as parties holders of liens upon the crop.

Under the 1933 Cotton Option and Benefit Contracts, lienholders obtain no contractual right to be named in the options or in checks liquidating the options.

Opinion Section Memorandum No. 13  
Dated September 28, 1933, and  
Supplement thereto dated December 7, 1933.



September 28, 1933.

MEMORANDUM FOR MR. JOHN B. PAYNE,  
COMPTROLLER, AGRICULTURAL ADJUSTMENT ADMINISTRATION

Pursuant to your request, I respectfully report my opinion as follows:

Opinion

1. Cotton option contracts executed under authority of Sections 6 and 7 of Part 1 of Title I of the Agricultural Adjustment Act, as amended, should not include as parties holders of liens upon the crops.

2. According to the statement of the problem as referred to us, it is intended to liquidate the options in cash when exercised. The Government checks may be made out to the same persons who were named in the option contract as parties entitled to exercise the option and need not include any other persons as payees.

Summary analysis of the questions presented

Three specific considerations present themselves in an analysis of this problem.

(1) What is the proper interpretation of the act? Does it authorize that option contracts and liquidating payments thereunder be made solely with or to the owners and operators of farms or does it permit or prescribe that lien holders be included as parties to such contracts or payments?

(2) Will the Government find itself under any liability to lien holders if they are ignored in executing the option contracts and making the payments in liquidation of the options?

(3) Will the administrative practice in this regard, should such lien holders be so ignored, mitigate against a favorable determination of the constitutionality of the Act, if that question is raised?

I.

The Act should properly be interpreted as intending the owners and operators of the farms as the only necessary or proper parties to the option contracts and the only persons entitled to payments in liquidation of such options.



The pertinent provisions of the Act are as follows:

"Sec. 6 (a) The Secretary of Agriculture is hereby authorized to enter into option contracts with the producers of cotton to sell to any such producer an amount of cotton to be agreed upon not in excess of the amount of reduction in production of cotton by such producer below the amount produced by him in the preceding crop year, in all cases where such producer agrees in writing to reduce the amount of cotton produced by him in 1933, below his production in the previous year, by not less than 30 per centum, without increase in commercial fertilization per acre.

(b) To any such producer so agreeing to reduce production the Secretary of Agriculture shall deliver a nontransferable-option contract agreeing to sell to said producer an amount, equivalent to the amount of his agreed reduction, of the cotton in the possession and control of the Secretary.

(c) The producer is to have the option to buy said cotton at the average price paid by the Secretary for the cotton procured under section 3, and is to have the right at any time up to January 1, 1934, to exercise his option, upon proof that he has complied with his contract and with all the rules and regulations of the Secretary of Agriculture with respect thereto, by taking said cotton upon payment by him of his option price and all actual carrying charges on such cotton; or the Secretary may sell such cotton for the account of such producer, paying him the excess of the market price at the date of sale over the average price above referred to after deducting all actual and necessary carrying charges: Provided, That in no event shall the producer be held responsible or liable for financial loss incurred in the holding of such cotton or on account of the carrying charges therein: Provided further, That such agreement to curtail cotton production shall contain a further provision that such cotton producer shall not use the land taken out of cotton production for the production for sale, directly or indirectly, of any other nationally produced agricultural commodity or product.

(d) If any cotton held by the Secretary of Agriculture is not disposed of under subsection (c), the Secretary is authorized to enter into similar option contracts with respect to such cotton, conditioned upon a like reduction of production in 1934, and permitting the producer in each case to exercise his option at any time up to January 1, 1935."

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power -

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments."

The wording of the sections in question strongly indicates that the legislative intention was that these options and any liquidating payments thereon should run directly to the farmers rather than to the farmers jointly with lien creditor.

It will be noted that the term "producer" is used exclusively throughout these sections. It is the producer alone who is entitled to exercise the options and to receive any liquidating payments.

The ordinary sense of the term "producer" would seem to be limited in definition to the persons actually owning and operating the farms. An extension of the definition of the word to include lien creditors, tested by common usage, would seem to be an extraordinary, rather than an ordinary, definition. Unless there is some indication in the Act, or in its legislative history, indicating unusual implications of the term, it should be accepted in its ordinary sense.

Reading the word "producer" in the context of Sections 6 and 7 of Part 1 of Title I of the Act, reinforces the conclusion that the term was used in its ordinary sense. An attempt to read the word "producer" as including a lienor in addition to the actual owner and operator of the farm would strain certain parts of these sections to the point of their being unintelligible. For instance, the option contracts are to be for amounts not in excess "of the amount of reduction in production of cotton by such producer below the amount produced by him in the preceding crop year." It is impossible to read "the amount produced by him in the preceding crop year" intelligibly if "him" signifies not merely the actual operator of the farm but also his lien creditors. Only by designating the "producer" as the actual owner and operator of the farm is it possible to give any intelligible and consistent meaning to this provision. Again the clause "that such agreement to curtail cotton production shall contain a further provision that cotton producers shall not use the land \* \* \*" indicates obviously that the person intended is the one actually using the land, in short, the farmer and not his creditors.

Reference to the legislative history of the Act further buttresses the conclusion.

There is a clear expression throughout the legislative history of the Act that it is intended to increase the farmers' purchasing power; to put into his hands cash for immediate expenditure in the purchase of industrial goods, thus to stimulate a new flow of trade and credit, decrease unemployment, etc. In short, the desired result was to give the farmer cash to be spent on purchases at once. Immediacy is of the essence of the problem. To divert these cash payments from him to his creditors is to that extent to divert the funds from the original purpose of increasing the purchasing power of the farmer. The most that could be hoped from such payments to his creditors would be that it would better his future credit. This course is clearly counter to the express intention of this legislation as found in the following statements:



(1) Recitals of the Act

"Declaration of Emergency

\* \* \* the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, \* \* \*."

"Declaration of Policy

to \* \* \* reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. \* \* \* (H.R. 3835, P.1)"

(2) President's Message to House of Representatives.

The President, in speaking of the proposed agricultural legislation stated:

"It relates to agriculture and seeks to increase the purchasing power of our farmers and the consumption of articles manufactured in our industrial communities; and at the same time greatly to relieve the pressure of farm mortgages and to increase the asset value of farm loans made by our banking institutions".

(3) Committee Reports

"The Committee on Agriculture, to whom was referred the bill (H.R. 3835) to relieve the existing national economic emergency by increasing agricultural purchasing power, having considered the same, report thereon with the recommendation that it do pass". (H.R. Rep. #6, P.1)

"The additional return received by farmers by reason of the operation of the bill will be money promptly spent by the farmer in ways that will decrease unemployment and add to the profits of business. At the same time the increased return will make available in rural communities additional funds, will increase the assets behind our rural banking structure, and it is believed, will do more to relieve the banking situation in rural communities than any other type of legislation. The increased return will aid farmers to meet their payments of principal and interest upon their indebtedness and will make liquid a large part of the assets of our credit structure that are now frozen". (id. P. 7)

"The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate (numbers 1 to 84, inclusive) to the bill (H.R. 3835), to relieve the existing national economic emergency by increasing agricultural purchasing power, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:" (H.R. Rep. 100, p. 1)



### Administrative Convenience Points to the Same Interpretation

In favor of this interpretation also, especially with reference to the question of who should be made parties to the option contract, is the fact that dispatch in the administration of these provisions of the Act would be seriously impeded by a contrary interpretation. If many persons were jointly entitled to exercise the options a prompt exercise of these rights would be rendered difficult if not impossible. The effectiveness of the legislation, as recognized in legislative comment, is so clearly dependent upon prompt administration that an interpretation which would deter speedy distribution of its benefits should be justified only upon explicit wording.

### Contrary Authority Distinguished

Certain cases under the Sugar Bounty Acts must be met and distinguished in arriving at the conclusion reached. The strongest of these is Suthon v. U. S. 81 Federal 810.

In that case a person was held to be a "producer" of sugar and entitled to the bounty within the meaning of the acts upon the following facts: he had advanced the owners of the plantation money for growing and manufacturing the crop and taken as security a mortgage on the plantation and a statutory pledge of the crop. The operation of manufacturing and disposing of the sugar was in his name and under the management of persons representing him as agents, and the license, under which the bounties were customarily paid, was also, under the terms of his agreement with the owners, to be taken out in his name. The established administrative practice was to pay the bounties to such licensees under the exact arrangements which he had followed, and these precedents had been relied upon by him.

This decision is distinguishable from the situation presented under the present Act on several grounds. In the first place, the purpose of the Act was to encourage the growing of beets, sorghum, and sugar cane in the United States. A person who undertook to finance and manage the production and disposition of the sugar was the most significant factor in performing the service desired by the Government. The creditors of the farmers are not such significant figures in carrying out the policy of the present Act. Additionally, under the Sugar Bounty Acts, there was a long administrative interpretation in practice favoring the inclusion of such a person within the definition of "producer" which is entirely absent under the present Act.

### II.

Upon the basis of the administrative facts as stated, the Government would seem to be incurring no liability by disregarding lien holders in executing the option contracts and making the liquidating payments upon their exercise.

A. The closest danger of liability lies in the following facts: In many instances to induce lien holders to consent to the "Offer to enter into cotton option-benefit or benefit contracts" they were permitted to

add a clause to subdivision 12 of the offer to the effect that checks were to be payable jointly to the producers and the lien holders. Specimens of these contracts show that in a wide majority of instances the clause added read substantially as follows: "Check for cash benefit to be payable to the producer and the undersigned lien holders". However, there are variances from this form and some at least read "Make check payable to producer and lien holder listed below". With this clause added the entire paragraph under subdivision 12 of the "Offer to enter into cotton-benefit or benefit contracts" reads:

"The undersigned lien-holder(s) and/or others having an interest in the 1933 cotton crop now being grown on the lands embraced in the foregoing offer, hereby consent(s) to the making of this offer and to the performance of the conditions thereof when and if accepted, and agree(s) that the Secretary or his agents may deal with the producer as if he were the sole party having interest in said cotton land or crop. Check for cash benefit to be payable to the producer and the undersigned lien-holder".

Preceding this paragraph are the paragraphs under subdivision 11 specifying the consideration for taking land out of production, to-wit: either a cash payment or cash payment plus cotton option.

It might well be asserted that by the addition of the clause in question the Government permitted a joint offer to be made by the producer and lien holders, and that acceptance resulted in a contract to which the lien holders were parties, and, therefore, entitled to the consideration specified which would include payments in liquidation of the cotton options as well as benefit payments. Such an argument would be a strong one and might, in final analysis, be reduced to a question of interpretation of the added clause.

We are informed that the Administrators were explicit in their representations that the joint checks contemplated by the added clause referred solely to benefit payments and expressly excluded payments in liquidation of the option contracts. This being so, it is safe to conclude that it may be established as a fact that the only contract rights of lien holders intended were in the benefit payments.

There is considerable support for this interpretation of the contract in addition to the facts relating to the administrative representations which have been given us as basis for this opinion.

The most prevalent form of clause written into these contracts made a distinction between "producers" and "lien holders" by specific enumeration. Under these circumstances it would not seem to lie fairly in the mouths of the lienors to assert that the term "producer" included lienors. If the term "producer" excludes from its definition lien holders then clearly a contract including lien holders as parties interested in the cotton options, and entitled to an interest in the liquidating payments, would be unauthorized under Section 6 of Part 1 of Title I of the Act. An interpretation of the contract should be given, if possible, which brings it within the authority of the legislative provisions for



its execution. While the clauses in question would make the contract unauthorized if interpreted to give lien holders an interest in the option contracts where such lien holders are, by the definition of the contract, a group apart from the producers; on the other hand, if the contract is interpreted as giving lien holders an interest solely in benefit payments then it is fairly authorized by the Act. While Section 6 of Part 1 of Title I of the Act specifies benefits for producers solely, Section 8 of Part 2 of Title I of the Act authorizes the Secretary to provide for reduction in acreage, etc.; "through agreements with producers or by other voluntary methods \* \* \* ". Under the last named section, if the Secretary finds it desirable to deal with lien holders as well as producers, he is specifically authorized to elect the method which accords with his own best exercise of discretion.

A further support which may be drawn from the terms of the contract in favor of an interpretation of the added clauses giving lien holders an interest in the benefit payments solely, is the fact that in the most prevalent form of the clause used a joint interest was specified only in checks for "cash benefit". There is no mention of "cash benefit" or "benefit payments" in Section 6 of Part 1 of Title I of the Act, while Part 2 of Title I specifically refers to "benefit payments". This selection of terminology in the added clauses would seem to accord with an interpretation which gives these clauses exclusive reference to Section 8 of Part 2 of Title I of the Act.

Benefit payments and cotton option contracts are treated distinctly under the Act and in point of fact have an entirely distinct legislative history. (S.R. 16, p. 2) This separate character of these two provisions of the Act is at least consonant with an administrative practice which recognizes interested parties with respect to the benefit payments who are excluded from an interest in the cotton option contract.

B. A second possible basis of liability might be claimed against the Government on the theory, that a lien holder, upon the wrongful destruction of the property to which his lien had attached, might assert the lien against the proceeds to be received for the property destroyed, while such proceeds were still in the hands of the Government.

Such an argument would seem necessarily to proceed upon the theory that the transaction between the Government and the producer was a sale of the produce and that the benefit payments and cotton options were a quid pro quo for the crops destroyed. In no sense is this the nature of the transaction. It is not one of sale, but the payment of a bounty for desired action on the part of the producer, and the payments are not a quid pro quo for the crops destroyed but for the action of the producer in taking the land out of production.

Five percent cases	110 U. S.	471
Banks v. Conant	14 Allen	497, (96 Mass.)
Kelly v. Sprout	97 Mass.	169
Alexander v. Wellington	2 Russ. & Myl.	35, 56, 64



These payments being in the nature of bounties, the Government has absolute discretion in the method, time, and conditions of such payments.

U. S. vs. Hall	98 U. S. 343, 355
McIntosh vs. Aubrey	185 U. S. 122
Frisbie vs. U. S.	157 U. S. 160
U. S. vs. Realty Co.	163 U. S. 427
Five percent cases	110 U. S. 471, 478
Blagge v. Balch	162 U. S. 439
4 Comp. Gen. 685 - 687	

### III.

There would seem to be no danger that an administrative interpretation of the Act which excluded lien holders from the benefits of the cotton option contracts would mitigate against favorable determination of the constitutionality of the Act, if that question should be raised.

An argument against the constitutionality of the Act on this ground would seem to be confined to a contention that the lien holders were deprived of property without due process of law. Such an argument would have to proceed upon the theory that the Government by inducing destruction of property in which the lien holders had an interest ~~was~~ depriving them of property. This seems an incredible extension of the constitutional provision and in this instance wholly unjustified in the facts. The Government has solicited destruction of the crops, but it has been an invitation for voluntary destruction and not a command. In addition, the Government has squarely placed upon the producer the obligation of securing the consent of lien holders prior to such destruction so that the responsibility of destruction without such consent rests not upon it, but upon the producer. Moreover, the present emergency would seem clearly to justify this action as a proper interference with individual rights in the interest of the general welfare.

People v. Nebbia                      262 N. Y. 259.  
Economy Dairy Co., Inc. v. Wallace, 61 Wash. Law Rep. 633.  
Southport Petroleum Co. v. Ickes, 61 Wash. Law Rep. 577

Alger Hiss,  
Assistant to General Counsel.

December 7, 1933

MEMORANDUM TO MR. PAYNE

Being a memorandum of facts supplementing memorandum dated September 28, 1933.

On page 6 of my memorandum to you of September 28, 1933 relating to the questions of (1) whether or not lienholders should be included as parties to cotton option contracts, and (2) whether or not the checks made in liquidation of such option contracts should include any other person as payee than the optionee, there was the statement that the legal division was informed that the administrators were explicit in their representations that the joint checks contemplated by clauses which were added to the cotton reduction contracts were only checks covering benefit payments. On the basis of this assurance, it was my opinion that no lienholders acquired any contractual right by virtue of such clauses to be named as optionees or to participate in checks sent out in liquidation of the option contracts.

You have requested that I investigate the facts relating to these representations and supply you with a detailed statement of the same. This memorandum is in response to that request.

I. Definitions in the Cotton  
Contract

(a) The contract distinguished producers from lienholders.

The person who signed the contract is referred to in the statement of consent and in the certification of the member of the local committee as the "producer". Paragraph 3 of the contract reads as follows:

"This crop is subject to lien in favor of:

NAME	NATURE OF LIEN	ADDRESS
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(After the name of the holder of the lien insert nature of the lien as landlord and/or mortgagees)"

Paragraph 4 reads as follows:

"Consent in writing of the lien holders has been or will be obtained by me before any part of the cotton planted is taken

out of production and/or before receipt by me of any benefit which may accrue to me hereunder."

In paragraph 12 of the contract, immediately following the signature of the producer, the following clause appears:

"The undersigned lien-holder(s) and/or others having an interest in the 1933 cotton crop now being grown on the lands embraced in the foregoing offer, hereby consent(s) to the making of this offer and to the performance of the conditions thereof when and if accepted, and agree(s) that the Secretary or his Agents may deal with the producer as if he were the sole party having interest in said cotton land or crop."

(b) The contract distinguished cash payments from options.

Paragraph 11 of the contract reads as follows:

"11. As a consideration moving to me for the taking out of production of this land, I elect to take --

- (1) A cash payment of \$\_\_\_\_\_ per acre, making a total of \$\_\_\_\_\_ for the \_\_\_\_\_ acres embraced in this offer based upon estimated production of not less than \_\_\_\_\_ pounds of lint cotton per acre; or
- (2) A cash payment of \$\_\_\_\_\_ per acre, making a total of \$\_\_\_\_\_ for the \_\_\_\_\_ acres embraced in this offer based upon the estimated production of not less than \_\_\_\_\_ pounds of lint cotton per acre, together with an option, a copy of which is at present on file in the office of the Secretary of Agriculture, and a copy of which the undersigned has received prior to executing this agreement (the terms and conditions of such option being therein set forth), to purchase from the Secretary of Agriculture at 6 cents per pound, basis middling 7/8-inch staple cotton as quoted on the New York Cotton Exchange, said option being for \_\_\_\_\_ bales of cotton, said number of bales representing the quantity of cotton which I estimate is taken out of production by virtue of this contract. (Strike out the form of compensation not elected by the grower)

Payment (and delivery of the option contract if compensation (2) is elected) is to be made as soon after the acceptance of this contract by the Secretary as I may furnish proof of compliance with the provisions of this contract. Such proof must be submitted on or before December 1, 1933. In addition to the cash and option contract considerations, I reserve the right to plant the acreage taken out of cotton production, providing the same is planted solely for the production of soil-improvement or erosion-preventing crops or food or feed crops for home use."



II. Definitions in regulations of the Secretary of Agriculture.

(a) The regulations distinguished producers from lienholders.

Cotton Regulations, Series I, covering the option-benefit, benefit, and option contracts here under consideration, were signed by the Secretary and by the President on July 25, 1933 and, pursuant to Section 10 (c) of the Agricultural Adjustment Act, have the force and effect of law.

These regulations distinguished producers from lienholders as appears from the following provisions:

"'Producer' means the operator of a cotton farm, including corporations and other business entities." (Sec. 100 (f) )

"'Lien-holder' means any person, corporation, or business entity having a legal or equitable claim for security against the 1933 cotton crop being grown on lands embraced in any offer to enter into cotton option-benefit or benefit contracts." (Sec. 100 (g) )

"All lien-holders and/or other persons having an interest in the 1933 cotton crop now being grown on the lands embraced in any producer's offer, if they consent to such offer, must indicate such consent by signing their names at the place provided for that purpose on the offer." (Sec. 205)

(b) The regulations distinguished cash payments from options.

The regulations define a "benefit" or "benefit payment" as:

"a cash payment moving from the Secretary of Agriculture to the producer in consideration of the reduction of cotton acreage pursuant to Subsection I, of Paragraph 11 of the offer to enter into cotton option-benefit or benefit contracts". (Sec. 100 (d) ).

They define an "option-benefit" as a cash payment as defined above "in combination with a cotton option contract pursuant to subsection (2) of paragraph 11" of the contract. (Sec. 100 (e) ).

III. Announcements by Department as to permission to lienholders to share in payments.

On July 27, 1933 the Department of Agriculture through the Office of Information issued a press release numbered 1426-33. This release was headed: "Lien Holders May Share Payments" and read as follows:

"Lien-holders are permitted to share in the payments made cotton producers if the acreage reduction program is put into

operation, it was announced today by the Agricultural Adjustment Administration.

"Field forces now engaged in presenting contracts to producers who desire to offer a portion of their cotton acreage for elimination from production were so instructed today by wire.

"The field agents were notified that with the consent of the producer and the lien holder the following clause may be added to the contracts:

'Checks for cash benefits to be payable jointly to the producers and the undersigned lien holders.'

"The present contracts provide that lien-holders' consent must be obtained in writing before the producer may offer land now planted in cotton, but no provision was made to distribute benefit payments to any persons having an interest in the crop except the producer.

"Field forces found that in many parts of the Cotton Belt, lien holders who had advanced money for the making of a crop desire to be protected to the extent of receiving a share of the payments contemplated in the contract. The added provision for making the checks payable jointly to the producers and lien holders has been authorized."

On the same day Mr. Cobb, Chief of the Cotton Section, Production Division, Agricultural Adjustment Administration in charge of the campaign sent the following telegram to state directors of extension which according to a memorandum to me dated November 24, 1933 from C. O. Pratt, Junior Administrative Assistant of the Cotton Section was relayed to county agents throughout the cotton belt:

"Answering a question that has arisen:

Local representatives or committeemen taking contracts from producers are authorized, with the consent of the producer and lien-holders, to add to the paragraph which appears just below the producer's signature and just above the lien-holders' signatures the following language 'Checks for cash benefit to be payable jointly to the producers and the undersigned lien-holders'".

Section 206 of the regulations provides as follows:

"Checks representing cash benefits may be made payable to the producer and a lienholder or lienholders, jointly, if request therefor be made in the offer."

#### IV. Conclusion

It is clear from the above that for the purposes of the 1933 cotton contracts, lienholders and producers were at all times defined as separate and distinct persons; that cash benefits were also clearly differentiated from options and that all official announcements were plainly to the effect that checks in payment of the cash benefits (as distinguished from options or checks in liquidation of the options) were to be made to lienholders and producers jointly.

Consequently the phrases inserted in certain of the contracts accepted by the Secretary such as "check for cash benefit to be made payable to the producer and the undersigned lienholders"; "make check payable to producer and lienholders listed below" or "Joint check requested" may safely be said to mean as a matter of fact that only the checks in payment of the cash benefit payment (as distinguished from the options or checks in liquidation of the options) were to be made jointly to lienholders and to producers in return for the lienholders' consent to the destruction of the 1933 crop. After investigation of the facts I am therefore of the opinion and so advise you that lienholders obtained no contractual rights to be named in the options or in checks liquidating the options.

Alger Hiss,  
Assistant to General Counsel.





No. 2

AUTHORITY TO ADJUST GOVERNMENT CONTRACTS

The executive heads of the several departments of the Government are not empowered to readjust contract prices to conform to higher costs occasioned by general laws or administrative action in the interest of the public welfare; they may, however, by agreement with contracting parties rescind the contracts and re-let them in the usual manner.

Opinion Section Memorandum No. 9  
Dated October 9, 1933.



October 9, 1933.

MEMORANDUM TO MAJOR C.W.DUNNING,  
Executive Assistant to Director  
of Processing and Marketing Division.

Pursuant to your request of September 18th, 1933, I respectfully report my opinion as follows:

QUESTION STATED

May the executive heads of the several departments of the government afford relief to parties with whom the government contracted for supplies prior to the initiation of the present program for National Recovery from losses or diminution of profits resulting from increased cost of the production or purchase of the contract commodities occasioned by that program?

OPINION

The executive heads of the several departments of the government are not empowered to readjust contract prices to conform to higher existing cost occasioned by general laws or administrative action in the interest of the public welfare. They may, however, by agreement with contracting parties rescind the contracts and re-let them in the usual manner.

STATEMENT OF FACTS

As a result of conforming to the President's Reemployment Agreement or to the terms of existing codes or marketing agreements the cost of commodities to nearly all contractors with the government has increased in major terms. Higher wages are being paid, higher prices being given growers and producers for their produce, etc. Processors and manufacturers are therefore not in a position to make sales at prices which prevailed prior to the inception of the present program for National Recovery without loss or diminution in expected profit. Apart from contracts with the government it is represented that through the cooperation of distributors the contract prices in existing agreements for future deliveries are being revised upward to maintain the previous proportions between cost and selling prices. In cases of contracts for supplies with the government such readjustments have not as yet been made. The President in press release #200 dated August 6th, 1933, stated that he should recommend such adjustments wherever they could be made under existing law and where the law impeded revision of contract prices would recommend to Congress appropriations to recompense contractors with the government in accordance with an equitable readjustment of such contract prices.

It is therefore evident that the policy of this administration is to make an equitable revision of stated prices in existing contracts with the government for supplies to conform to the increased cost of the commodities to the contractor resulting from the present program for national recovery. The question raised is how far existing laws inhibit this policy.



## DISCUSSION

I. The enactment by the government of general laws or policy materially interfering with or increasing the burden of performance of a contract with it does not excuse the other contracting party from further performance or give rise to any obligation on the part of the government beyond the existing obligations of the contract.

(a) Action of the government taken in the public interest, though it increases the burden of performing a contract previously entered into with it, is not to be assimilated under the ordinary principles of contract law excusing performance on the part of one contracting party where the other has breached the contract or interfered materially with its performance. The governing principle in these circumstances is stated in Jones and Brown's case, 1 Ct. Cl. 383, 384 (1865):

"Whatever acts the government may do, be they legislative or executive, so long as they be public and general, can not be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."

See also 28 Op. Atty. Gen'l. 121, 122 (1909).

" \* \* \* the mere fact that the government, by general law, has so changed the conditions under which a contract with it was to be performed as to injuriously affect the contractor would not invalidate the contract."

(b) It is equally clear that such action on the part of the government does not constitute a breach of contract which would permit recovery against it in the Court of Claims or justify voluntary payment of damages.

Horowitz v. U. S., 267 U.S. 458 (1925)

Deming v. U.S., 1 Ct. Cl. 190 (1865)

It is therefore not open to the executive heads of the government to compensate contractors for losses under government contracts in the present situation upon this theory.

(c) Under ordinary contract principles an agreement on the part of the executive heads of the government to pay to the present contractors an increased price for goods which they are bound to deliver under existing contracts would be without consideration and unenforceable. Consistent with these principles the Comptroller General has specifically indicated that he will not allow voluntary payment of increased prices under these existing contracts. (Comp. Gen'l. A - 50593, August 31, 1933.)

This is in accordance with an established line of similar decisions:

26 Comp. Treas. 396 (1919)  
5 Comp. Gen'l. 605 (1926)  
24 Comp. Treas. 385 (1918)

II. The executive heads of the several departments of the government may relieve contractors of performance of agreements with the government by rescinding the contracts where the burden of performance has been materially increased through the enactment of general laws.

An exact authority for this point is found in 28 Op. Atty. Gen'l. 121 (1909). This involved a contract entered into by the War Department for the delivery of three hundred thousand (300,000) pairs of gloves to be made in Germany. The contract contained a clause giving the government the right to increase the amount of gloves ordered by 50%. The department had refused to allow a clause providing for adjustment in case a tariff should be imposed upon the importation of the gloves. After delivery had begun a tariff was for the first time made effective on such imports, and the government increased the amount of its order to the permitted extent of 50%.

The Attorney General advised that the Secretary of War might relieve the contractor from further performance as to gloves required to be delivered after the Tariff Act became effective, both under the original and the supplementary orders.

The Attorney General said:

"While the question is not free from doubt, I feel constrained to hold that the Secretary has such authority and that the equity which has been created by the action of the Government itself forms a sufficient justification for the suspension of the contract. I am unable to concur in the view that executive officers are limited in matters of this kind wholly to considerations affecting the pecuniary interests of the Government. In my opinion the honor of the nation is of greater importance.....  
In the present case it is manifest that the enforcement of the contract in question would simply cause a wrong which Congress would have to be called upon to right. Such enforcement would, therefore, expose the Government to merited reproach".

This is the only direct authority which has been found for the point but see also 33 Op. Atty. Gen'l. 69 (1921) and Savage Arms Corp. v. United States, 266 U.S. 217 (1924).

III. In the event of such rescission there is no authority for recontracting immediately for the same supplies with the persons relieved of performance under the prior contract. The contract must be re-let in the usual manner provided by the pertinent statutory provisions, requiring open bidding, etc.

This point was raised in 21 Op. Atty. Gen'l. 115 (1895). Relief had been sought for the lessee of certain privileges at Ellis Island on account of unforeseen circumstances involving special hardship. (There is nothing in the opinion to indicate that the unanticipated hardship arose from any action of the government.) The lease in question contained a clause that the Secretary might amend for cause. The Attorney General stated:

"But by 'cause' as used in each of said contracts must be meant, in all probability, some fact or state of facts inducing or justifying an abrogation of the contract for the benefit of the United States. The right to break the contract can hardly have been reserved to the United States for the benefit of the contractor. Further, the desired changes in the existing contracts cannot be accomplished by the process of first putting an end to them and then making others, since, being once cancelled, new ones could be made only in a prescribed statutory method: that is, 'after public competition'."

Jerome N. Frank,  
General Counsel.



No. 3

BONDS OF TREASURERS OF COUNTY  
WHEAT PRODUCTION CONTROL ASSOCIATIONS

Funds appropriated by Section 12(b) of the Agricultural Adjustment Act are available for "administrative expenses" and may be used to pay the administrative expenses of County Wheat Production Control Associations established under Section 10(b).

The treasurers of such Associations, to whom such funds are advanced, should be required to give bond payable to the United States or to an officer thereof.

Opinion Section Memorandum No. 1  
Dated October 17, 1933.



October 17, 1933.

MEMORANDUM TO MR. C. C. DAVIS,  
Director, Production Division.

Dear Mr. Davis:

Pursuant to your request of October 6, 1933, I respectfully report my opinion as follows:

Question Stated

May payments be made to treasurers of the several County Wheat Production Control Associations for the purpose of meeting administrative expenses of such Association without requiring such treasurers to file bonds payable to the United States or to any officer thereof?

Opinion

Upon the basis of the facts reported to me as stated below, it is my opinion that administrative expenses of these Associations may be paid in the usual course as administrative expenses under Section 12(b) and (c) of the Agricultural Adjustment Act.

In respect to advances made to the treasurers of these Associations to be disbursed by them from time to time to meet the administrative expenses of the Associations

(1) insofar as such advances do not represent deductions from payments due to the producer, they may be justified only as advances to special agents charged with the disbursement of public moneys, and such agents must give bond to the United States or an officer thereof; and

(2) insofar as such advances represent deductions from payments due to the producer under the terms of the Wheat Allotment Contract, a bond running to the United States or an officer thereof is necessary to protect the United States in respect to its liability to the producer in the event that such advances are not actually expended for administrative expenses authorized by the contract.

Statement of Facts

The Wheat Production Control Associations were set up for the purpose of cooperating with the Secretary of Agriculture in making effective the provisions of the Agricultural Adjustment Act. It is provided in the Articles of Association that the expenses of the Association shall be met by (1) funds to be deducted from payments under the Wheat Allotment Contract; (2) assessment of the members of the Association. In effectuating the policy enunciated by the Secretary of



placing immediately in the hands of the farmers, without delay or diversion, the first payments due under the contract are to be made without any deduction for administrative expenses of the Associations. The existing situation is that several Wheat Production Control Associations are without funds of their own for the purpose of administration. It is essential to the continued operation of these associations that funds for administrative expenses be available. It is not considered satisfactory from an administrative point of view to meet these expenses by the method of reimbursement upon vouchers submitted after such expenses are incurred.

### Pertinent Sections of the Act

Section 10 (b) provides:

"The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this title, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of rental or benefit payments."

Section 12 (b) provides:

"In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses; rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection".

## Discussion

### I.

Payment of the necessary administrative expenses of the County Wheat Control Associations is authorized as an administrative expense for which appropriation is made in the Agricultural Adjustment Act.

The Secretary is specifically authorized, under Section 10 (b) to establish associations of producers for the more effective administration of the functions vested in him, etc. These Associations are organized for the purpose of cooperating with the Secretary in making effective the provisions of the Act (Section 1 of Article II of the Articles of Association of The Wheat Production Control Association). The establishment of such Associations means not merely formal organization, but effective organization. This is necessarily implied from the declared purpose of establishing such Associations, to wit, "for the more effective administration of the functions vested in" the Secretary. According to the information upon the basis of which my opinion has been requested, the expenditures contemplated are essential to the effective organization of the several Wheat Production Control Associations. These expenditures are, therefore essential outlays for the effective administration of the functions of the Secretary through an agency specifically authorized by the Act.

Section 12 (b) appropriates the proceeds from processing taxes to be available to the Secretary "for administrative expenses", among other purposes. This is an explicit appropriation authorized for disbursement for essential administrative expenses.

In Section 12 (c), there is an enumeration of certain specific administrative expenses. The section reads as follows: "The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. \*\*\*\*\*".

Clearly, this section is not an exclusive enumeration of proper administrative expenditures. It specifies that " \*\*\* administrative expenses provided for under this section shall include, among others, \*\*\* ". The words "among others" obviously contemplate other administrative expenditures in addition to those enumerated. This section is, therefore, not an impediment to the contemplated expenditure as an administrative expense.

### II.

The fact that, under the Wheat Allotment Contracts, the administrative expenses of the county Associations may be deducted from the payments to be made the producers does not change their character as administrative expenses under the Act.



By paragraph 14 of the Wheat Allotment Contract it is provided:

"There shall be deducted from the adjustment payments to be made under this contract a sum sufficient to defray the producer's pro rata share of the administrative costs of the Wheat Production Control Association in his county and the producer expressly authorizes the Secretary or the Secretary's authorized agent to make such deductions. Such pro rata share shall be computed on the basis of the number of bushels in the farm allotment."

The effect of this provision is that that part of the administrative expense authorized under the Act which is represented by the administrative expenses of the various county Associations will eventually be borne by the producers. The arrangement is purely contractual and does not alter the authority of the Secretary to provide, at such times and in such amounts within the appropriation granted as may be necessary, for administrative expenses necessary for the effective functioning of the Act.

Except, however, as payments to producers from which deductions may be made are due and payable, there is no fund available for meeting such expenses except the general appropriations provided in Sections 12 (a) and (b) of the Act. Moneys advanced to the county Association treasurers from such appropriations necessarily remain public moneys until actually expended by the Associations or until deducted from the amount of payments actually due producers under the Wheat Allotment Contract.

### III.

In expending funds advanced for administrative expenses under the Act, the county Association treasurers are acting as special agents of the government in disbursing public moneys. As such they are required to give bond, and such bond should be payable to the Secretary of Agriculture or to the United States.

Whereas the foregoing argument justifies payment of administrative expenses of these Associations upon a proper voucher in the usual manner as administrative expenses under 12 (a) and (c), it does not justify advances to the treasurers of these Associations to be expended by them from time to time as administrative expenses of the several Associations arise. Such outlays to the treasurers of these Associations would be in the nature of advances prohibited under Section 529, 31 U.S.C.A., Rev. Stat., Sec. 3648, unless they can be brought within one of the specific exceptions to that prohibition.

The only specific exception which might properly apply is that permitting such advances to disbursing officers of the government as may be necessary to the faithful and proper discharge of their respective



duties and to fulfillment of their public engagements. Though this is provided only "under the special direction of the President", in point of fact the special direction of the President in each case is not required. It is enough if the President has issued general instructions, providing for advances from time to time, on the basis of estimates or requisitions showing a necessity therefor. Williams v. U. S., 42 U. S. (1 How.) 290 (1843).

The treasurers of these Associations may fairly be considered disbursing officers of the government for the purpose of making these expenditures on account of administrative expenses under the Act. In that case, however, they are within the category of special agents charged with disbursement of public moneys under Section 481, 31 U.S.C.A., Rev. Stat. Sec. 3614, which provides:

"Bond of special agents. Whenever it becomes necessary for the head of any department or office to employ special agents, other than officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as the head of the department or office employing them may approve."

Under the conclusion reached in (II) above, the treasurers of the county Associations, in expending advances from the government of funds with which to meet administrative expenses, are acting as agents of the government disbursing "public moneys". Bond is therefore required under the above statute.

It is true that the statute does not specify the form of bond except that it must be such "as the head of the department or office employing them may approve". It is clearly the object of the statute, however, to protect the government against loss of public moneys. That the statute has been so construed and acted upon is indicated by the departmental regulations issued pursuant thereto, requiring such bonds to run in favor of the United States. See, for example, Fiscal Regulations of the Department of Agriculture, Sec. 13 and 57. And see 28 Att'y. Gen'l. 28 (1909), construing the provision of 6 U.S.C.A., Sec. 14, that the United States shall not pay the cost of bonds required by law of any officer or employee of the United States, and characterizing such bonds as "bonds running to the United States and which are to be accepted in each case by the properly designated officer of the United States".

In the present case, to protect the United States, it is necessary that the bond should be payable to the United States or to some officer thereof. This is not altered by the fact money advanced and expended for administrative purposes may be deducted from payments which the government will be obligated to make at a future date.

The Wheat Allotment Contract provides that the adjustment payment "shall be made to the producer". The deduction authorized is only for "a sum sufficient to pay the producer's pro rata share of the administrative costs of the Wheat Production Control Association". If, then, money advanced to the treasurers for administrative expenses is not so used or is not accounted for, the United States is without defense against claims of the producers for the amount of the unauthorized expenditure or deficiency.

The situation would be otherwise if a portion of moneys already due and payable were paid to the treasurers who should then be authorized as agents for the Secretary to draw upon the same for administrative expenses. By paragraph 14 the producer "expressly authorizes the Secretary or the Secretary's authorized agent to make such deductions". The producer thereby makes the Secretary's agent his agent for the purpose of making such deductions, and therefore may be regarded as waiving his right of recourse against the Secretary to the extent of any wrongful deductions for administrative expenses. The essential difficulty, however, remains. Although the treasurer may be the producer's agent to make deductions, nothing in the contract gives the Secretary the right to recognize the treasurer as the agent of the producer to receive payment. As to any excess of advances over deductions made for administrative expenses, the United States remains liable to the producer. It is by no means impossible that a treasurer might misapply the entire amount advanced without any actual or even pretended expenditures for administrative purposes.

According to the contract, the producer contracts with the Secretary "upon the conditions hereinafter set forth and subject to the regulations (which shall be deemed to be part of the terms and conditions of this contract) heretofore or hereafter prescribed by the Secretary pursuant to the above Act." But it does not follow that the Secretary may prescribe that the treasurers of the County Associations shall be competent to act as the agents of the producers to receive payment. By the terms of this provision the regulations to be made must be in the nature of an addition to the conditions set forth in the contract. No authority is given to change a material term of the contract, and, as has been seen, the contract expressly provides that payment shall be made "to the producer". Par. 17. The government's promise to pay a certain sum of money is the consideration (so stated in the contract) to the producer for entering into the contract. In the printed form of Application for Wheat Allotment Contract three of "the more important clauses" of the contract were summarized for the information of the producer. The summary included the provision for payment to the producers. The word "regulation" has a limited meaning and cannot be considered to embrace a rule which would transfer the risk of loss from the United States to the other party to the contract. As indicated in the agreement itself "regulations" are rulings as to matters of detail - for example, in respect to the method of determination of what constitutes a 20% reduction per farm (Par. 1.); the method of making proof of compliance with the terms of the contract (Par. 17); the method of determining the current average farm price of wheat per bushel (Par. 18).

These specifications are sufficient to indicate the incidental character of the regulations intended.

In view of the foregoing, it is submitted that funds cannot safely be paid to treasurers of the Wheat Production Control Associations, either as advances of public moneys or as part payment of moneys due to producers under the Wheat Allotment Contracts, without requiring bond running to the United States or to an officer thereof.

Jerome N. Frank,  
General Counsel.





No. 4

CONTRACTS FOR REMOVAL OF SURPLUS

The Secretary may use funds appropriated by Section 12(b) of the Agricultural Adjustment Act to remove surplus agricultural products, and, in so doing, he is not limited to the means provided in Section 8(1) and 8(2), but he may adopt any appropriate means, including contracts entered into without preliminary hearing.

Opinion Section Memorandum No. 5  
Dated October 25, 1933.





October 25, 1933.

MEMORANDUM TO MR. FRANK

Re: CONTRACTS FOR REMOVAL OF SURPLUS

Dear Mr. Frank:

I submit herewith my opinion upon the following question:

QUESTION

May the Secretary enter into contracts with processors under which the processors shall buy up basic agricultural commodities constituting a market surplus and the Secretary shall in turn purchase such commodities from the processors, for relief purposes, at the same time making compensation for the processing thereof? May the Secretary enter into contracts for the removal of surplus agricultural commodities to foreign markets? In making such contracts, is the Secretary limited to the terms of Sections 8 (1) and/or 8 (2)?

OPINION

Sections 8 (1) and 8 (2) authorize alternative methods of controlling, or providing for the removal of, surplus. But in the use of funds appropriated under Section 12(b) for the removal of surplus, the Secretary is not limited to the means provided in Sections 8 (1) and (2). He may adopt any appropriate means for the purpose including contracts entered into without preliminary hearing.

I.

The Secretary is authorized to enter into contracts for the removal of surplus under the terms of Section 12(b).

Section 12(b) provides:

"In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes."

Funds are thus appropriated for the specific purpose of removing surplus.

Section 627, 31 U.S.C., provides:

"No act of Congress shall be construed to make an appropriation out of the Treasury of the United States or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed. (June 30, 1906, 34 Stat. 764)

This statute prohibits the making of contracts in excess of appropriations made by law unless authority to enter into a contract is specifically granted. 17 Comp. Treas. 511 (1911). Where, however, an appropriation is made for a stated purpose and the means of effecting the purpose are not specified, authority to employ appropriate means, including the making of contracts, to accomplish the stated purpose is implied.

6 Comp. Gen'l. 618, 621 (1927)

19 Op. Atty. Gen'l. 650, 654 (1890)

It should be noted that, if contracts for the removal of surplus are entered into upon the authority of Section 12(b) alone, the appropriation available for carrying out such contracts is limited to the proceeds from taxes imposed under the Agricultural Adjustment Act.

## II.

The Secretary is authorized to enter into certain types of contract for the removal of surplus under the terms of Section 8(1).

Contracts to arrest the actual process of cultivation or production are clearly embraced in the power conferred in Section 8 (1) -

"To provide for .... reduction in the production for market .... of any basic agricultural commodity, through agreements with producers or by other voluntary methods."

Such a program as that by which the government causes the slaughter of young pigs which have not grown to standard market weight and sows due to farrow is clearly designed to effect "a reduction in production for market" and is an appropriate voluntary method of securing that result. Whether that phrase may be construed to include not only steps taken to arrest the actual growth or multiplying of the commodity but steps to arrest the flow of fully grown commodities of normal market grade into the ordinary channels of trade is not here considered. Payments made to hog producers to procure the slaughter of young pigs and pregnant sows may properly be considered benefit payments in connection with reduction in production for market as provided in Section 8 (1).

Although benefit payments are not defined in the Act, examination of the Act as a whole leaves no doubt that the farmer is the beneficiary intended.

Section 8 (1), by which the Secretary is authorized to provide for benefit payments, deals with the general problem of reducing production for market, by two methods:

- (1) Reducing acreage.
- (2) Reducing production for market.

These provisions necessitate dealings with those persons who have control over growing crops or agricultural commodities before they reach the commercial market, that is to say, producers. If the process of production is to be arrested before the commodity reaches the market, it is the producer who must be compensated.

It is the declared policy of the Act to restore the purchasing power of the farmer to its base period level. Obviously the whole scheme of the Act indicates that this is in part to be achieved by benefit payments which to serve this purpose must be made to farmers.

The Secretary of Agriculture, explaining the powers to be conferred by the bill, stated (p. 129, Hearings before Senate Committee on Agriculture on H.R. 3835, March 1933):

"First, there is the authority to provide for the effective, yet voluntary reduction in crop acreage planted. Second, the authority to provide for reduction in the amount of any commodity produced for market. To carry out a program of either acreage or production control, authority is asked to compensate the producer through rental or benefit payments. The bill contains revenue features adequate to prevent any loss to the Treasury by reason of such control operations."

Again, Section 10 (b) authorizes the Secretary to permit associations of producers to act as agents of their members and patrons in connection with the distribution of rental and benefit payments. This provision contemplates the payment of benefits to producers.

There is nothing in the text of the Act, or in its history or purpose, to indicate that distributors or others engaged in the commercial handling of agricultural commodities may be the beneficiaries of such payments. On the contrary, the phraseology adopted, as well as the circumstances surrounding the enactment of the measure, indicate their exclusion from such benefits.

In support of this conclusion, see, among other references:



Hearings, Senate Committee on Agriculture on  
H.R. 3835, p. 128-219, Statement of  
the Secretary of Agriculture.  
Message from the President of the United States,  
March 16, 1933, House Document No. 5,  
73rd Congress.  
Report of House Committee on Agriculture,  
House Report No. 6, 73rd Congress p. 3.  
Report of Senate Committee on Agriculture,  
Senate Report No. 16, 73rd Congress,  
p. 3.  
Congressional Record, 73rd Congress,  
pp. 1957-59

However, the Secretary in providing for benefit payments is not required to deal directly with producers. In carrying out a reduction program under 8 (1), he is empowered "to provide for rental or benefit payments in connection therewith", and he may do so "through agreements with producers or by other voluntary methods." This language clearly authorizes arrangements with others than producers, provided such arrangements are otherwise consistent with the purposes of the subsection as stated above.

Section 10 (b) provides that the Secretary may

"permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of rental or benefit payments."

Under this provision the Secretary may not recognize processors as the agents of producers for the purpose of receiving and distributing payments. That the exclusion of processors from acting in such capacity was intentional and deliberate is indicated by the following extract from the report of the Conference Committee on the bill:

"Amendment No. 32: The House bill permitted the Secretary of Agriculture to permit cooperative associations of producers to act as agents of their members and patrons in connection with the distribution of rental and benefit payments. The Senate amendment extends this authority to processors as well as associates of producers. The Senate recedes."

Nothing in 10 (b), however, limits the Secretary in making arrangements with processors or others as agents for him in making payments to the producers.

If any difficulty exists it is in the lack of express authorization for the appointment of such agents. For while heads of departments may determine when an exigency arises necessitating the employment of agents and may employ them accordingly, they may do so only when Congress has provided the authority by law, and to the extent of the authority.

Bartlett vs. U.S., 197 U.S. 230 (1905).

Weeks vs. U.S., 21 Ct. Cl. 124 (1886).

It is not, however, required that authority to enter into contracts and to employ agents be expressly conferred; such authority is implied when necessary or appropriate to the execution of a statutory duty.

U.S. vs. Tingey, 5 Pet. 115 (1831)

U.S. vs. Brindell, 110 U.S. 688 (1884)

21 Op. Atty. Gen. 1 (1893)

The Secretary, in acting under 8 (1) is not required to rely on implied authority only. Authority is granted to use, in addition to agreements with producers, "other voluntary methods". This language is adequate to include acting through such agents or other intermediaries as may be deemed advisable.

Section 10 (a), which makes express provision for the appointment of officers, employees and experts, does not limit the power of the Secretary to employ agents in connection with particular transactions. "Within the ordinary acceptance of terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee".

Louisville R.R. vs. Wilson, 138 U.S. 501, 505.

It is not necessary that agents employed in particular transactions be appointed in accordance with Civil Service regulations or be required to take oath as officers of the United States.

Auffmordt vs. Hedden, 137 U.S. 310 (1890)

Nor does Section 10 (b) limit the authority of the Secretary in respect to contracts of the type here considered. It merely confers express authority to establish "State and local committees, or associations of producers" and to recognize associations of producers as agents of their members in the distributions of benefit payments.

When agents are employed for services in connection with a particular transaction, it is not necessary that such agents should act in the name of the United States or should bind or purport to bind the United States.

26 Comp. Treas. 141 (1919)

The contractor or agent is entitled to reimbursement for moneys laid out under the terms of the contract, and to payment for services performed, and it is no objection that the United States should not have benefited directly thereby.

26 Comp. Treas. 141 (1919)

McClure vs. U.S. 19 Ct. Cl. 173 (1884)

### III

The Secretary may, under Section 8 (2) enter into Marketing agreements to reduce, or prevent the accumulation of, surplus.

Section 8 (2) does not in terms provide for reducing production or removing surplus, nor does it exclude the use of marketing agreements for such purpose. Whether a marketing agreement is an appropriate means of meeting any aspect of the production problem can only be decided in reference to definite proposals and factual situations.

For the purpose of this memorandum, the following points are noted in connection with this subsection:

- (a) The provisions of this subsection are not in any way dependent upon 8 (1).

Nothing in the language of the Act requires that the power conferred in 8 (1) must be used in conjunction with the power conferred in 8 (2). On the contrary there are clear indications that these powers are not interdependent.

(1) The various subsections of Section 8, with the exception of (5), constitute grants of power under distinct and coordinate headings. While it is obvious that one or more of these powers might be helpfully combined under certain circumstances, the combined use of all of them at one time would be extraordinary, and no one of them is made dependent on any other.

(2) The power conferred in 8 (1) applies only to basic agricultural commodities. That conferred in 8 (2) applies to any agricultural commodity or product thereof.

(3) Section 8 (1) provides for agreements with producers. Section 8 (2) provides for agreements with "processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof" -- thereby excluding producers not falling within this definition.

(4) Agreements under 8 (1) provide for benefit payments for which appropriation is made in 12 (a) and (b). No appropriation is made for marketing agreements but a distinct method of financing, in the form of loans from the Reconstruction Finance Corporation, is provided in connection with such agreements.

(5) Throughout the Congressional discussion the powers conferred under Section 8, and particularly those under 8 (1), 8 (2) and 8 (3), were treated as distinct and independent, related only as offering means to the accomplishment of the same general end. Thus Secretary Wallace in the Senate Hearings (pp. 129-131) stated of these powers generally:



"To deal with the many factors that contribute to the farmers' present situation, and to deal with those factors as they vary in application to the commodities concerned, and to meet changes in the economic situation, Congress must enact legislation granting broad and flexible powers to the administration .....

The particular powers that will be exercised with respect to any given commodity at any given time cannot be stated in advance."

And, specifically:

"Marketing agreements ..... may, in many instances assure producers a fair return without the necessity for the processing tax and rental or benefit payments."

Again:

"Should, as a result of the operation of the bill, there develop practices or charges unfair to the producer or consumer, I would feel that the licensing provision might be called into play."

- (b) The agreements contemplated appear to be in the nature of a general regulation of marketing practices pertinent to the attainment of the objects of the Act.

That such agreements may run counter to the anti-trust laws of the United States and may be injurious to some elements in the industries affected, is indicated by the provision for suspension of the anti-trust laws to the extent of the agreement and for notice and hearing to "interested parties". A contract by which the Secretary undertook to buy up and pay for surplus need not be of this character, but an agreement by which those engaged in the handling of a commodity should regularly deter the marketing of large quantities or bear the burden of part of the surplus reaching the market might come within its terms. (As in the case of Marketing Agreement on Northwest Wheat).

#### IV.

Contracts entered into for the removal of surplus under 12 (b) need not be either benefit contracts as authorized in 8 (1) or marketing agreements as authorized in 8 (2).

The above conclusion is supported by examination of:

- (a) the text of the section in relation to the text of other sections
- (b) the legislative history of the section

- (c) It is a familiar rule of construction that a statute must be construed as a whole, and the text of any particular section must be considered in connection with the text of other sections to which it may relate.

"That every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." Pennington v. Coxe, 6 U.S. (2 Cranch.) 33, 55 (1804)

Section 12, under the heading "Appropriation", provides for the financing of the extensive activities authorized under Title I of the Act. If the purposes enumerated in this appropriation section are merely a restatement of those set forth in the preceding sections, for which designated means of accomplishment are specified, it might be reasonable to conclude that they are limited by the specification of means in such preceding sections. But the wording of 12 (b) is not susceptible of such construction. The money appropriated is

"for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes."

By the very terms of the subsection "expansion of markets and removal of surplus agricultural products" are additional to administrative expenses, rental and benefit payments, and refunds on taxes authorized under part 2.

It is an established rule of construction that the legislature is presumed to have used no superfluous words, and statutes should be construed so as to give full effect to the words used:

U.S. v. Lexington Mill Co., 232 U.S. 399, 410 (1914)  
Platt v. Union Pacific R.R. Co., 99 U.S. 48, 55 (1878)  
Erster v. Centennial Board, 94 U.S. 500, 503 (1876)  
Stephens v. Cherokee Nation, 174 U.S. 445, 480 (1899)

That the word "and" always expresses the relation of addition requires no argument.

Montello Salt Co. v. Utah, 221 U.S. 452, 466 (1911)

It is plain that appropriation is made for expansion of markets and removal of surplus agricultural products additional to the following enumerated purposes under part 2: "administrative expenses, rental and benefit payments and refunds on taxes." Since the appropriation for surplus removal here granted is additional to benefit payments, the purpose and means of effectuating it cannot be limited by Section 8 (1) which contemplates expenditures by way of benefit payments only. It is even more apparent the appropriation cannot be limited, for surplus removal purposes, to marketing agreements under 8 (2). No appropriation is specified in connection with marketing agreements, and the fact that benefit payments are specifically enumerated as within the appropriation while no mention at all is made of marketing agreements indicates that no appropriation in connection with such agreements merely as such was intended. This view is confirmed by the provision, already noted, for financial arrangements of another character, by means of Reconstruction Finance Loans to the parties to the marketing agreement.

In 12 (b) the appropriation for removal of surplus is linked to "expansion of markets". Nothing in Section 8 has any clear relation to expansion of markets. The absence, in other sections, of any specification of method for expanding markets is a reason for concluding that the appropriation "for expansion of markets and removal of surplus" as it appears in 12 (b) is an authorization of activities going beyond those authorized in Section 8.

(b) This conclusion is supported by reference to the legislative history of this provision.

The words "expansion of markets and removal of surplus" are not found in the original bill. They first appear in the bill as ordered printed by the Senate on April 17. The amendment was adopted only after considerable debate centering on the criticism that this provision would diminish the benefits to be received directly by the farmers. The sponsor of the amendment admitted that it would operate in this manner (Cong. Record, 73rd Congress, pp. 1957-59):

MR. GEORGE: The Senator is entirely right in saying that from the money raised by the processing tax the Secretary of Agriculture may grant certain benefits. He may lease acreage, or he may pay back to the producer of the taxed commodity his pro rata part of the tax. If he should use a portion of the funds raised by the tax for the purpose of expanding markets, he would, of course, thereby diminish the amount that would be returned to the producer in the form of one benefit or another.



That is true; but in the one case of cotton-- and I am thinking of it entirely--in the one case of cotton the Secretary of Agriculture might find it more advantageous to the cotton producer if he utilized a part of the processing tax levied on cotton for the purpose of expanding the market for cotton products than if he utilized it all for the rental of acreage or for the return to the farmer of the fee levied in the form of a direct benefit....

This provision is constructive. This provision will do good to cotton. This provision can be successfully applied; but the Secretary of Agriculture, of course, might not apply it. It simply gives him the option. Instead of using an all-acreage-licensing proposal or an all-allotment proposal, it simply gives him the additional option of using a part of the processing tax levied on the particular commodity to carry that commodity or its products into markets from which it is now excluded.

The report of the Conference Committee on this amendment is as follows:

"Amendment No. 49: The House bill appropriated the proceeds derived from taxes for rental and benefit payments and for administrative expenses under the cotton option plan and the commodity benefits provisions. The Senate amendment appropriates the proceeds of the taxes imposed and makes them available for the expansion of markets and removal of surplus agricultural products, for administrative expenses, and for rental and benefit payments under part 2 (the commodity benefits provision). The Senate amendment in addition appropriates \$100,000,000 to defray administrative expenses in connection with the agricultural adjustment program, and for the purpose of making rental and benefit payments with respect to reduction in acreage or production. The House recedes with clerical changes.

The conclusion is amply warranted that in adding to section 12(b) the phrase "for expansion of markets and removal of surplus agricultural products" an enlargement of the powers of the Secretary to effectuate the purposes of the Act by arrangements not embraced within 8 (1) or 8 (2) was intended. It follows that such arrangements are not subject to the requirement of benefit payments to producers as provided under 8 (1) and are not subject to the requirement of preliminary notice and hearing provided for under 8 (2).

Francis M. Shea  
Chief of Brief and Opinion Section  
Legal Division

No. 5

INJUNCTIVE RELIEF TO RESTRAIN  
VIOLATIONS OF LICENSE

Jurisdiction will be found in Sections 24(1) and 24(8) of the Judicial Code for proceedings in a federal court to restrain a violation of a license issued under Section 8(3) of the Agricultural Adjustment Act.

Opinion Section Memorandum No. 24  
Dated October 25, 1934.





October 25, 1933.

MEMORANDUM FOR MR. ARTHUR C. BACHRACH

Dear Mr. Bachrach:

Pursuant to your request of October 23, 1933, I respectfully reply to the second part of the first question as follows:

Where the Secretary of Agriculture is presenting a complaint, jurisdiction may be grounded on two separate statutory provisions: First, Section 24(1) of the Judicial Code appearing in 28 U.S.C.A., Section 41(1) provides "the district court shall have original jurisdiction as follows: 1. First, suits of a civil nature at common law or an equity brought by the United States, or by any officer thereof, authorized by law to sue." Second, in view of the fact that the declaration of emergency in the Adjustment Act states as one support of the exercise of congressional power the federal control of interstate commerce, Section 24(8) of the Judicial Code, 28 U.S.C.A., Section 41 (8) which provides that the district court shall have original jurisdiction "of all law suits and proceedings arising under any law regulating commerce", will support the jurisdiction. Since the proceeding you speak of is in equity for injunctive relief, Sections 24 (2), 28 U.S.C.A. 41(2) which gives the federal courts jurisdiction over all crimes and offenses against the laws of the United States; and Section 24(9) 28 U.S.C.A. 41(9) giving the same courts jurisdiction of all proceedings in suits by the United States to collect penalties and forfeitures are inapplicable.

However, in reference to the grounds of jurisdiction which will support injunctive relief this further may be said:

The requirement that the suit involve a sum of more than \$3,000.00 is not a relevant limitation.

1. Jurisdiction will be found in Section 24(1) of the Judicial Code. All the cases in which the Attorney General brought suit, without specific statutory authorization, to protect a federal instrument and plan, were brought in the name of the United States. Therefore, clearly falling within the clause of Section 24(1) of the Judicial Code. These cases appear in the first part of the answer to the question. Revised Statutes, Sections 359 and 367 (5 U.S. Code Sections 309 and 316) lead to this result because, by their terms, it is an interest of the United States which the Attorney General is authorized to protect.

In order to sue under this clause it is not necessary that the question involved arises under the laws of the United States. This was held in Bank of United States vs. Planters' Bank of Georgia, 22 U.S. 904 (1824), where a bank, by implication authorized to sue in the federal courts, brought suit in those courts on a note involving only the questions of general commercial law.

The \$3,000.00 limit is inapplicable since, first, a reading of Section 24(1) will show that the \$3,000.00 requirement is so placed in the sentence as to modify only the grant of jurisdiction in cases brought by private citizens where there is a diversity of citizenship or a question arising under the laws of the United States. It must always be remembered in reading the provisions of Section 24 that each grant of jurisdiction is separate and distinct and one is not a limitation on the other. Though there is a requirement that in the cases arising under the laws of the United States the sum involved be at least \$3,000.00 and though the jurisdiction of the court of the suits brought by the United States constitutionally depends on the fact that such suit arises under the laws of the United States, the argument cannot be advanced that the money limited on the first ground of jurisdiction is applicable to suits brought by the United States. This conclusion has been upheld in the United States vs. Sayward, 160 U.S. 493, (1895) and also in the lower federal courts; United States vs. Reid, 90 Fed. 522 (1898); United States vs. Flournoy Live-Stock and Real-Estate Company, 71 Fed. 576; and Armstrong vs. Trautman, 36 Fed. 275. Furthermore, this jurisdiction granted the federal courts in suits brought by authorized officials of the United States will not be defeated, though there be joined with these officials as party plaintiff another party who could not have brought the suit in the Federal courts alone. Erickson vs. United States and U.S. Spruce Production Co., 264 U.S. 246 (1924).

2. That the jurisdiction may be grounded on Section 24(8) of the Judicial Code because the A.A.A. is a statute relating to interstate commerce. As has been stated above, the declaration of emergency describes this statute among other things as such a regulation. However, there is a danger in arguing this ground of jurisdiction. The declaration of emergency undertakes to support the validity of this statute on other grounds than the interstate commerce. Should the government in a suit urge the above ground of jurisdiction it might find itself limited in supporting the validity of the Act to the interstate commerce power solely, if the defendant should contest the jurisdiction by the following argument:

Since the statute is an invalid exercise of federal power over interstate commerce, the court has no jurisdiction under Section 24(8) which applies only to valid exercises of the interstate commerce power. In arguing the presence of such jurisdiction the Government might have to show this statute to be a valid exercise of such commerce power. The possibility that the Government may have to frame the issue in this way will not be over great. There is the answering argument that though this statute may not be a valid exercise of the federal commerce power, the fact that one can reasonably dispute the question raises a substantial question sufficient to ground jurisdiction. See Erickson vs. U.S. and U.S. Spruce Production Co., 264 U.S. 246 (1924); Lucking vs. Detroit & Cleveland Navigation Co., 265 U.S. 346 (1924).

However, should the Government care to support the jurisdiction of the federal court under Section 24(8) there is sufficient authority



for its position. A suit under Section 24(8) may validly be brought in the federal court even by a private citizen. Louisville & Nashville R. R.Co. vs. Rice, 247 U.S. 201(1918).

In suits under Section 24(8) there is no requirement that the sum in dispute satisfy the statutory minimum of \$3,000.00. Turner, Dennis & Lawry Lumber Co. vs. Chicago, Milwaukee & St. Paul R.R. Co., 271 U.S. 259 (1926). Though most cases employing the section of the Judicial Code as the basis of federal jurisdiction are suits for freight charges brought by railways or for freight over charges brought by interstate shippers, involving the provisions of the Interstate Commerce Act. Davis vs. Age Herald Publication Co., 293 Fed. 591(1923) (freight over charge); New York Central Railway Co. vs. Mutual Orange Distributors, 251 Fed. 230(1919) (for collecting freight charges), yet in terms Section 24(8) is not so restricted.

Most relevant is the case of Ingram Day Lumber Co. vs. U.S. Shipping Board Emergency Fleet Corp., 267 Fed. 283 (1920). A suit for the price of lumber sold this government-owned corporation was properly removed to the lower federal courts under Section 24(8) because the corporation had been formed in and of interstate commerce. The fact that the suit raised an issue as to the liability of an instrument in aid of interstate commerce was sufficient. In the instant situation, we have an issue involving another instrument in aid of interstate commerce: the license.

No discussion has been presented of the possibility of grounding the jurisdiction on the claim that this is a case of controversy arising under the laws of the United States, though it can clearly be so upheld. Such suits require that the amount involved satisfy the minimum of \$3,000.00; and this is an unnecessary restriction which the government need not encounter.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Legal Division.





No. 6

MARKETING AGREEMENT FOR COTTON GINNERS

While the question is not free from doubt, cotton ginner may be considered to be engaged "in the handling, in the current of interstate or foreign commerce, of any agricultural commodity \* \* \*" within the meaning of Section 8(2) of the Agricultural Adjustment Act and are therefore eligible parties to a marketing agreement.

Opinion Section Memorandum No. 8  
Dated October 26, 1933.





October 26, 1933

MEMORANDUM TO MR. PRESSMAN

Pursuant to your request I respectfully report my opinion upon the following question:

QUESTION

May the Secretary enter into a marketing agreement with cotton ginnerers under the provisions of Section 8 (2) of the Agricultural Adjustment Act?

OPINION

There is serious enough conflict in the relevant case material on this question to make it impossible to forecast with certainty whether, if the question reaches a point of litigation, the courts would determine that the authority of the Act authorizes marketing agreements with cotton ginnerers, or, to put the matter more definitely, that cotton ginnerers are engaged "in the handling, in the current of interstate or foreign commerce, of any agricultural commodity \*\*\* ". The probabilities, I am inclined to believe, are in favor of an interpretation which would include cotton ginnerers within the contemplation of this authority.

I.

This belief is supported by an interpretation of the language of Section 8 (2).

(a) Section 8 (2) authorizes marketing agreements with "processors, associations of producers, and others engaged in the handling, in the current of interstate\*\*\*commerce of any agricultural commodity\*\*\* ". If the limits of the activities included in the current of interstate commerce by this clause permit authorized control to reach so far back that it extends to the activities of the associations of producers, then cotton ginnerers, who are a step nearer the interstate transportation of the commodity, must necessarily be included. To restate: Associations of cotton producers in a majority of instances are banded together for the purpose of successful bargaining with independent ginnerers and actually sell the cotton of its members to such ginnerers starting the cotton on its way into interstate transportation. Yet, these associations are treated by Section 8 (2) as handling in the "current of interstate or foreign commerce". Therefore, the cotton ginnerers who are a step further on toward the interstate transportation must necessarily be within this "current".

This argument is compelling unless it may be said that the associations of producers referred to are only those directly engaged in marketing to buyers in other states. If this were so, two types of discriminatory

results would follow obviously at odds with the uniform policy of the Act.

(1) This interpretation would authorize agreements with associations of producers for the marketing of commodities where the practice is to sell to buyers in other states. It would exclude agreements with associations of producers in these commodities where marketing takes place intrastate.

The Act clearly intended producers of all basic agricultural commodities at least to receive the major benefits of its provisions. This interpretation would exclude cotton, one of the basics, from enjoying the benefits of Section 8 (2) and 8 (3) as related to associations of producers.

(2) The interpretation considered would also permit discrimination in the enjoyment of its benefits between associations of producers in the same commodity because of accidental geographical location of their marketing outlet. For instance, many of the largest flour mills are located in Minnesota. If this interpretation considered where applied, associations of Minnesota producers selling to these flour mills would not enjoy the advantages of Section 8 (2), while associations of producers located in neighboring states, who sold to the same mills would enjoy these advantages.

The Act clearly contemplates a national economic plan which reaches, with its benefits, its organization of production and marketing, the basic industry of agriculture throughout the United States. The considered interpretation would permit disruption of the uniform operation of the plan upon grounds which are purely accidental in relation to the considerations upon which the plan is promised.

(b) Since one of the purposes of marketing agreements is to confer price benefits on the producers of cotton and since 75% of this cotton is sold by the producers to ginneries, if marketing agreements could not be entered into with these ginneries, then the provision for marketing agreements would be of little benefit to the cotton producing industry. Not only would these producers be excluded from the benefits of Section 8 (2) but, since the language of Section 8 (3) is the same, they would be excluded from the benefits of the licensing provisions.

(c) It is recognized that an argument may be made against the inclusion of ginneries within the classes of persons with whom the Secretary is authorized to enter into marketing agreements on the basis of Section 9 (d) (2), which provides:

"In case of cotton, the term 'processing' means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term 'cotton' shall not include cotton linters."

It may be contended that as ginning is excluded from the definition of "processing", ginners are excluded from the definition of "processors". Therefore, ginners are excluded from the class of "processors \*\*\* engaged in the handling" of an agricultural commodity "in the current of interstate \*\*\* commerce" as specified in Section 8 (2) of the Act. However, it is not necessary to bring ginners within the class of processors under Section 8 (2) as the further classification of "others engaged in the handling" of agricultural commodities" in the current of interstate \*\*\* commerce" clearly includes ginners unless it may be successfully asserted that they do not handle agricultural commodities in the current of interstate commerce. That argument is not in the foregoing, as well as the following discussion.

## II.

The case material may be interpreted so as to support the belief expressed in Paragraph 1 of this memorandum.

(a) Not only may Congress control the interstate transporters of commodities such as railroads, but also those who process the commodity on its way from the farmer to the consumer. The cases which are cited deal with the interpretation of the Federal Power over interstate commerce granted by the Constitution. If anything, the terms of the Act, "handling in the current of interstate or foreign commerce" would permit a broader inclusion of activities than those falling within the constitutional authority for federal regulation of interstate commerce.

In Stafford v. Wallace, 258 U. S. 495, it was held that Congress might regulate not only stockyards where cattle are kept on their way to other markets but also slaughter houses which are clearly analogous to cotton gins. And in United States v. American Tobacco Co., 221 U. S. 106 (1911), it was held that people dealing in the manufacture of tobacco and its preparation for the market were affecting interstate commerce. The decisions in both of these cases follow the language of Mr. Chief Justice White in Standard Oil v. United States, 221 U. S. 1(1911), where he says on Page 68:

"So far as the objections of the defendants are concerned they are all embraced under two headings:--

(a) That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects dehors the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States. But all the structure upon which this argument proceeds is



based upon the decision in United States v. E. C. Knight Co., 156 U. S. 1. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice."

(b) Looked at in another way, we must consider, in view of the declaration of emergency which appears in the Act, that Congress has found competition of a certain nature so destructive of the whole interstate dealing with commodities that anything which affects this type of competition it proposes to control. This view of the power over interstate commerce will be found in the language of Stafford v. Wallace mentioned above:

"The only question here is whether the business done in the stockyards between the receipt of the live stock in the yards and the shipment of them therefrom is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. \* \* \* \* Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. \* \* \* \* The application of the commerce clause of the Constitution in the Swift Case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its

necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part. \* \* \* \* Of course, what we are considering here is not a bill in equity or an indictment charging conspiracy to obstruct interstate commerce, but a law. The language of the law above that what Congress had in mind primarily was to prevent such conspiracies by supervision of the agencies which would be likely to be employed in it. If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the Swift Case, certainly it may provide regulation to prevent their formation. The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

If Stafford v. Wallace speaks in terms of the evils of monopolistic competition, then the Agricultural Adjustment Act speaks in terms of the evils of uncontrolled production and destructive competition. Substituting the intent of Congress in the Agricultural Adjustment Act for that under the Anti-Trust Laws in the language of Stafford v. Wallace, recorded above, we would find an opinion flatly in support of the interpretation that the ginning industry is an essential part of the current of interstate commerce.

(c) The only case which in terms is troubling is Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129 (1921) where a state regulation of cotton ginning was said not to interfere with interstate commerce.

In dealing with this case one thing must be remembered, that the Supreme Court has frequently permitted a state to regulate an industry, asserting that such regulation does not interfere with interstate commerce where it will also permit the Federal Government, when it so desires, to regulate the industry as interstate commerce. At one time it was held not improper for a state to regulate local railway rates, but when the Interstate Commerce Commission undertook the regulating of these local rates because of their effect on interstate commerce, it was held to be within their power. Minnesota Rate Cases, 230 U. S. 352 (1913); Shreveport Case, 233 U. S. 342 (1915); see collection of cases cited by Brandeis, J., in Texas, etc., R. R. v. Northside R. R., 276 U. S. 475 (1928), pointing to the many occasions when the Commission has controlled the extension of new lines for completely intra-state roads. See on this whole matter Bikle, (The Silence of Congress, 39 Harvard Law Review).

Furthermore, though one might treat a cotton ginner in isolation as not being within interstate commerce, when an act is passed by Congress to regulate the whole basic industry of agriculture in the United States for the benefit of interstate commerce, then cotton ginneries, which are one of the factors important to this whole scheme, must be included. This point of view is further expressed when the court said in Stafford v. Wallace:

"This court declined to defeat this purpose (of benefiting the stream of interstate commerce of meat products) in respect of such a stream and take it (the slaughter houses) out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential and subordinate part." (Underscoring supplied.)

It is found that there are two levels from which the interstate character of an industry may be viewed: one as in isolation, where it may be treated as local; and two as a part of the great commercial stream that passes through the nation, where it is treated as subject to the Federal control of interstate commerce.

A more elaborate discussion of the question involved is under preparation.

Francis M. Shea  
Chief of Brief and Opinion Section  
Legal Division



No. 7

IMPORT RESTRICTIONS IN  
RELATION TO MARKETING AGREEMENTS

The Secretary has no power, by virtue of the delegation of authority made pursuant to Section 8(b) of the National Industrial Recovery Act, to invoke the procedure prescribed in Section 3(e) of that Act in order to protect marketing agreements entered into under the Agricultural Adjustment Act.

No power is conferred by the Agricultural Adjustment Act to invoke a procedure similar to that provided by Section 3(e) of the National Industrial Recovery Act.

Quaere as to the extent to which licenses, under Section 8(3) of the Agricultural Adjustment Act, may be used to correct competitive import situations created by the operation of marketing agreements.

Opinion Section Memorandum No. 6d.  
Dated October 28, 1933.



October 28, 1933.

MEMORANDUM TO MAJOR C. W. DUNNING  
EXECUTIVE ASSISTANT TO DIRECTOR,  
PROCESSING AND MARKETING DIVISION.  
Re: COMPETITIVE IMPORT SITUATIONS  
CREATED BY THE OPERATION OF MARKET-  
ING AGREEMENTS.

I submit herewith my opinion upon the following questions raised in the memorandum from Captain E. L. Pardon, transmitted with your memorandum of September 22nd:

QUESTION

May the Secretary invoke the procedure of Section 3(e) of the National Industrial Recovery Act to correct competitive import situations with respect to agricultural commodities operating under marketing agreements, as distinguished from National Recovery Act codes? If not, what procedure, if any, is available to the Secretary for this purpose?

Opinion

The Secretary has no power, by virtue of the delegation of authority pursuant to Section 8 (b) of the National Industrial Recovery Act to invoke the procedure prescribed in Section 3 (e) of that Act, and no power is conferred by the Agricultural Adjustment Act to invoke a similar procedure. The power of the Secretary under Section 8 (3) of the Agricultural Adjustment Act to issue licenses offers a means, within certain limitations, of correcting competitive import situations created by the operation of marketing agreements.

Discussion

I

The Secretary can derive no power, by virtue of authority delegated pursuant to Section 8 (b) of the National Industrial Recovery Act, to invoke the procedure prescribed in Section 3 (e) of that Act in order to maintain agreements under the Agricultural Adjustment Act.



Agreements under the Agricultural Adjustment Act do not fall within the terms of Section 3 (e) of the National Industrial Recovery Act. The procedure there provided is to be invoked upon complaint that articles are being imported in such manner of quantity as "to endanger the maintenance of any code or agreement under this title". If, therefore, agreements under any other title or Act are to be embraced, it must be by virtue of authority extended elsewhere to bring them within the provisions of the Section.

The functions and powers which the President may delegate to the Secretary of Agriculture by virtue of Section 8 (b) of the National Industrial Recovery Act are those "under this title with respect to trades, industries, or subdivisions thereof which are engaged in the handling of any agricultural commodity or product thereof, or of any competing commodity or product thereof." Since the President has no power under the National Industrial Recovery Act to invoke the procedure of Section 3 (e) with respect to marketing agreements under the Agricultural Adjustment Act, it follows that he cannot delegate such power.

## II

The Agricultural Adjustment Act provides no procedure similar to that provided in Section 3 (e) of the National Industrial Recovery Act.

This is apparent from the reading of the Act and requires no enlargement.

## III

The power of the Secretary under 8 (3) to issue licenses may be extended to importers of commodities affected by marketing agreements under 8 (2), subject to the terms and conditions specified in 8 (3).

Section 8 (3) is not drawn with special reference to imports, but it does not exclude those engaged in the handling of imported commodities. Licenses may be issued to those handling

"any agricultural commodity or product thereof"  
or "any competing commodity or product thereof."

However, any proposal for licensing would require consideration in the light of the facts of the particular situation. The extent to which licenses may be issued to limit the quantity of commodities, whether of domestic or foreign production, permitted to enter the channels of trade, is to be the subject of special consideration in another connection.

It should be possible, in the issuance of licenses, to subject imported commodities to the same burdens and regulations as are applied to domestic commodities with which they may compete.

As to Section 15 (e), concerning which Mr. Purdon has raised a question, this is clearly designed to correct one type of competitive import situation by providing for the levy of a tax on imported commodities. However, this is not applicable except in respect to commodities, upon which a processing tax has been imposed. Such tax is authorized only when a benefit payment has been arranged in respect to the basic commodity, and has no reference to marketing agreements as such, nor to the commodities affected by them.

Francis M Shea,  
Chief of Brief and Opinion Section.  
Legal Division.





No. 8

APPLICATION OF SECTION 3(e) OF THE  
NATIONAL INDUSTRIAL RECOVERY ACT TO IMPORTS  
FROM HAWAII AND FROM THE  
PHILIPPINES

Imports from Hawaii are not imports "into the United States" within the meaning of Section 3(e) of the National Industrial Recovery Act and are therefore not subject to restrictions under that section; imports from the Philippines, however, are subject to restriction under the terms of Section 3(e).

Opinion Section Memorandum Nos. 6a and 6b  
Dated October 31, 1933, and November 17,  
1933, respectively.

See also Opinion of the Attorney General  
dated December 2, 1933, in the Appendix.  
(A-3).



October 31, 1933.

MEMORANDUM TO MR. PRESSMAN

I submit herewith my opinion on the following:

QUESTION

May the procedure provided in Section 3(e) of the National Industry Recovery Act be invoked to limit imports from Hawaii?

OPINION

Imports from Hawaii are not imports "into the United States" and are therefore not subject to limitation under 3(e).

Congress has provided that, except for certain specified exceptions, the laws of the United States, "which are not locally inapplicable", shall have the same force and effect in the Territory of Hawaii "as elsewhere in the United States." 48 U.S.C. Section 495. Hawaii is deemed to be incorporated into the territory of the United States. Hawaii v. Mankichi, 190 U.S. 197.

A similar question arose in connection with the statutes for the regulation of the coasting trade (24 Stat. 79, as amended by 30 Stat. 248) which provided

"No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty\*\*\*"

The Attorney General gave the opinion that Honolulu is a "port or place in the United States" within the meaning of the Statute. 36 Op. Atty. Gen. 352 (1930).



Commodities which enter the continental United States from Hawaii would seem to be in no different situation from commodities shipped from one state to another except that they are necessarily transported by water, and that they are shipped from within an organized territory instead of from a state. Assuming the Constitutional power to discriminate on such a basis, notwithstanding Section 8 (1) of the Constitution requiring that all duties, imports, and excises shall be uniform throughout the United States, Congress has indicated no intent to make such distinction.

It must be concluded, therefore, that Section 3 (e) cannot be invoked with respect to imports from Hawaii.

Francis M. Shea  
Chief, Brief and Opinion Section.

November 17, 1933.

MEMORANDUM TO MR. PRESSMAN

I submit herewith my opinion upon the following:

QUESTION

May the procedure provided in Section 3 (e) of the National Industrial Recovery Act be invoked to limit imports from the Philippines?

OPINION

The procedure specified in Section 3 (e) is available, to limit imports from the Philippines,

1.

Articles brought in from the Philippines are "imported into the United States" within the meaning of 3 (e).

Although the Philippines are not a "foreign country" in respect to the dealings of the United States with other sovereignties (Faber v. U.S., 221 U.S. 649, (1911)), they have not been incorporated into the United States. Dorr v. United States, 196 U.S. 138 (1904). It is therefore within the power of Congress to provide for the collection of duties or for the imposition of other restrictions upon goods imported from such territory. Dornes v. Bidwell, 182 U.S. 244 (1901).

The words "importation of articles into the United States", as used in Section 316 of the Tariff Act of 1922 (42 Stat. 943), was exhaustively considered with reference to the Philippines in 35 Op. Atty. Gen. 273 (1927). It was there remarked (p.276) that the words "import", "importation", and "imported" are, by derivation, broad enough to include generally articles brought into a country from outside its limits, as ordinarily understood, without fine distinctions based upon the political status of the locality whence they came. Their scope may therefore be measured with reference to the

evil against which the statute is directed. Having concluded, upon a review of tariff legislation that the Congress has not treated the Philippines as within the United States for tariff purposes, the Attorney General held that the phrase "importation into the United States" embraces articles brought in from the Philippines.

The tariff Act of 1930 continued the policy of treating the Philippines as not a part of the United States for tariff purposes, Section 301 providing that:

"There shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries\*\*\*"

While the phrase "imported into the United States" has been characterized as "inapt" when used in a statute to apply to goods brought in from territory belonging to the United States (see Santoni v. Rafferty, 10 F.(2) 788, 789, (1926) it is nevertheless frequently encountered in judicial utterances with reference to such commerce. See Downes v. Bidwell, 182 U.S. 244, 287 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176, 181, (1901); United States v. United Cigar Stores, 1 U. S. Court of Customs Appeals 450.

Both in the terms of statutes and in judicial utterances, therefore, the term "imported into the United States" has been used to embrace goods entering the United States from the Philippines. It is apparent that a contrary construction in the present instance would be inconsistent with the purpose of 3 (e) which is intended to provide a means for meeting competitive import situations which endanger the maintenance of codes and agreements entered into under the National Industrial Recovery Act. Such codes do not extend to the Philippines. (See memorandum of October 31; and see also 36 Opin. Atty. Gen. 326 (1930)). Consequently, products having their origin in the Philippines, being produced free from increased costs resulting from compliance with code provisions would have a decided competitive advantage over goods produced in the United States. Unless the provisions of 3(e) may be called upon to counteract the advantage, maintenance of the codes may be seriously endangered.

A further reason for construing the section as applicable against articles of Philippine origin is that Congress in the Agricultural Adjustment Act has provided in Section 15(e) for a compensating tax on imports which applies to imports from the Philippines. (See memorandum of August 29.) It has thus evinced an intent to



subject articles entering the United States from the Philippines to burdens comparable to those imposed upon competing commodities domestically produced by application of the provisions of this legislation. Where two acts are passed as part of a common scheme of legislation, dealing with related subject matter, it is proper to construe them together to carry out the legislative intent of harmonious operation. See Hagler v. Security Mut. Life Ins. Co., 244 Fed. 863, 870 (1917), Commonwealth v. King, 202 Mass. 379, 88 N. E. 454 (1900). In the absence of expressed intent that the words "imported into the United States" should not apply to articles imported from the Philippines, Section 3(e) should be given a construction consistent with the purpose of the Act and the policy evidenced by the Congress and should be deemed to apply to importations from the Philippines.

Francis M. Shea  
Chief of Brief and Opinion Section



No. 9

NATIONAL INDUSTRIAL RECOVERY ACT

CODES - APPLICATION TO HAWAII, ALASKA,

PUERTO RICO, ETC.

Codes, under the National Industrial Recovery Act,  
apply to Hawaii, Alaska, and Puerto  
Rico, but do not apply to the Philippines  
or other island possessions.

Opinion Section Memorandum No. 14  
Dated October 31, 1933.

See also Opinion of the Attorney  
General dated December 2, 1933,  
in the Appendix (A-3).





October 31, 1933.

MEMORANDUM TO MR. PRESSMAN

I herewith submit my opinion on the following:

QUESTION

Do National Industrial Recovery Act codes apply to the territories and the insular possessions?

OPINION

The National Industrial Recovery Act codes do apply to Hawaii, Alaska, and Puerto Rico, without specification, but do not apply to the Philippines or other island possessions.

By specific enactment Congress has provided that the Constitution, and laws of the United States which are "not locally inapplicable" shall have the same force and effect in Alaska and in Hawaii "as elsewhere in the United States." 48 U.S.C. Sections 23 and 495. In consequence of these enactments, Alaska and Hawaii are deemed to be incorporated into the territory of the United States. Alaska v. Troy, 258 U.S. 101 (1921); Hawaii v. Mankichi, 190 U.S. 197.

Statutory Laws of the United States which are "not locally inapplicable" are, by statute, extended to Puerto Rico with the same force and effect "as in the United States". 48 U.S.C. Section 734. Puerto Rico is not deemed to be incorporated into the United States, even though the Organic Act of 1917 (37 Stat. 951) provided for extending federal citizenship to the citizens of Puerto Rico. Balzac v. Porto Rico, 258 U.S. 298 (1922). But, by reason of the statute, unless otherwise provided or "unless locally inapplicable", statutes passed by the Congress apply to Puerto Rico. No reason is perceived for regarding the National Industrial Recovery Act as "locally inapplicable". The National Prohibition Act, the Immigration Act, and the Act providing for the registration of trade marks have been held to apply to Puerto Rico. Ramos v. U.S., 12 Fed (2) 761 (1926); 24 Op. Atty. Gen. 86 (1902) 25 Op. Atty. Gen. 634 (1902).

The Philippines, like Puerto Rico, have not been incorporated into the United States. Dorr v. U.S., 195 U.S. 138. It is moreover, provided by statute that "The statutory laws of the United States enacted subsequent to August 29, 1916, shall not apply to the Philippine Islands, except when they specifically so provide, or it is so provided in this chapter." 48 U.S.C. Sec. 1003.

A similar question in respect to the application of the Agricultural Marketing Act of 1929 received the thorough consideration of the Attorney-General who gave the opinion that that Act extended to Hawaii, Alaska, and Puerto Rico but not to the Philippines, and stated that "all such laws of general character and universal application are applicable in such territories unless the legislative intent that they should only have explicit application elsewhere is made to appear." 36 Op. Atty. Gen. 326, 329 (1930).

In respect to the island possessions other than Hawaii, Puerto Rico, and the Philippines, no provision has been enacted to extend, or provide against the extension of, the statutory laws of the United States. However, it is the general rule that in territories acquired and merely appurtenant to the United States, government under the prior-existing system of laws is continued by the authorities in occupation under the direction of the President until Congress has otherwise provided. Allen v. U.S., 47 F. (2) 735 (1931) (Virgin Islands); Downes v. Bidwell, 182 U.S. 244 (1901).

If the Philippines and other insular possessions, other than Puerto Rico and Hawaii, are subject to codes under the Recovery Act, therefore, it must be by virtue of express provision in the Act itself. No such provision can be found. The only reference to such possessions is found in Section 7 (d) in the definition of "interstate or foreign commerce" in terms which would embrace commerce between insular possessions. But this is not to say that the statute shall operate generally in such territory. The phraseology used is given full force and meaning by regarding obstructions to that commerce, as well as to other parts of the "flow of interstate and foreign commerce" as obstructions which it is the policy of the Act to remove. Section 1. It is to be considered that if the act were deemed, because of this definition, to apply to any of the insular possessions, it would logically apply to all, even those, such as Guam and Samoa, to which Congress has never extended the provisions of general federal statutes. Such an unprecedented extension cannot be inferred from phrases of doubtful implication having no necessary application to the question. See 36 Op. Atty. Gen. 326, 331 (1930).

It must be concluded that Congress has used no words in the Act itself which can properly be construed as extending its provisions to the insular possessions.

No. 10

MEMBERS OF CONGRESS AS PARTIES TO BENEFIT  
CONTRACTS

The Secretary may proceed with a benefit payment contract signed by a member of Congress who signs as a lienholder only; or, if a promise of payment has been made to such member and such member has subsequently executed an absolute waiver of interest, the Secretary may proceed with the contract.

In view of the provisions of Sections 204 and 205, 18 U.S.C.A., the Secretary may not proceed with a benefit payment contract in which a member of Congress has the entire interest as a producer; but, when a member of Congress is joined with another person as a producer and has executed a waiver of his interest, payment for an actual reduction of acreage may be made to such other person notwithstanding the invalidity of the agreement.

Members of Congress may become parties to agreements under Section 8 (2) of the Agricultural Adjustment Act and Section 4(a) of the National Industrial Recovery Act.

Opinion Section Memorandum No. 16  
Dated November 15, 1933.

See also Opinion of the Attorney General dated December 16, 1933, in the Appendix (A-4)





Nov. 15, 1933.

MEMORANDUM FOR THE SECRETARY

Dear Mr. Secretary:

Consideration has been given to your memorandum of September 20, 1933, making inquiry as to whether or not the provisions of Section 204, Title 18, U. S. Code, which prohibits members of Congress from entering into contracts with the Government, applies to cases where their private ownership of cotton land and/or crops makes members of Congress eligible to execute cotton option-benefit or benefit contracts, agreeable to the provisions of the Agricultural Adjustment Act. You have submitted with your memorandum copies of the contract forms now being utilized and also copies of forms for waivers prepared for execution by members of Congress waiving the benefit proceeds or a portion thereof to their tenants.

You state that in order to protect members of Congress who were ignorant of the prohibition against their entering into contracts with the Government and particularly those who had signed cotton option-benefit or benefit contracts, all southern Congressmen were notified of such prohibition, and it was suggested that all of those who had signed such contracts without intending to receive any of the benefit payments should sign a waiver to that effect; that those who intended to waive part of the benefit payments should likewise sign a waiver, indicating the percentage they were willing to forego and they were further advised that all sums payable to them under their contracts would be held in escrow by the Agricultural Adjustment Administration until such time as Congress might direct how the money so held should be applied.

You further call my attention to Section 205, Title 18, U. S. Code, which prohibits officials of the Government from entering into contracts with Congressmen. My opinion is specifically requested as to whether the above-mentioned statute or any other provisions of law prevents the making of benefit payments to members of Congress and, if so, whether the steps heretofore taken are appropriate from a legal standpoint. In the same connection you also request to be advised as to whether or not members of Congress may enter into marketing agreements provided for by Section 8 (2) of the Agricultural Adjustment Act and further, whether or not they may enter into the agreements provided for by Section 4 (a) of the National Industrial Recovery Act:

Considering first the cotton benefit contracts, the interests of members of Congress which appear in these contracts may be divided into two classes: (1) where the Congressman appears as a lienholder or other having an interest in the crop; and (2) where he appears as a producer either individually or jointly with his tenant. The effect of Sections 204, 205 and 206 of Title 18, U. S. Code and Section 22 of Title 41, U. S. Code, is different in each of these cases. In the first situation, the Congressman does not appear as a party to the contract. The Government proposes merely to take cognizance of his interest in the crop by having his name appear in the offer to enter into the benefit contract. Where he signed as a consenting person making no claim to any part of the benefit payments, clearly he has no interest in the contract which could bring it within the terms of Section 204 of the U. S. Code. Where on the other hand the Government undertakes to make him a joint payee of the benefit checks, it does so to secure his consent as a person interested in the crop. If this undertaking is to be interpreted as an agreement, it is quite independent of the producer's contract with the Government. The original agreement between the producer and the Government is independent and unaffected by the collateral one with the lienholder or other person having an interest in the crop, and such person is not to be considered as a party to the main agreement. Neither is the producer's contract that of a third party who has entered into an agreement for the use, benefit or account of, or in trust for the member of Congress appearing as a lienholder or other having an interest in the crop. Therefore, though the undertaking by the Government to the lien-holding member of Congress be void for illegality, that agreement is severable from the one with the producer. It is a settled rule of law that if one contract be legal and another illegal, though related to the same physical transaction, the legal one may be sustained where the illegal one remains void. Armstrong v. Toler, 11 Wheat. 258 (1826) at page 266.

See also Armstrong v. American Exchange Bank, 133 U. S. 433 (1889), where the Court on page 469 said:

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case."

An absolute waiver of interest in the benefit contract by a member of Congress on the form provided is not, in itself, a contract. Furthermore, it is not every agreement entered into with the United States which comes under the ban of section 204 of the U. S. Code. When an opinion was requested of the Attorney General as to whether



this Section invalidated an agreement in which a member of Congress appeared as a surety to the Government, he responded in 18 Opin. Atty. Gen. 286 (1885) that since the Government promises the surety nothing and was under no obligation to him, the contract was valid. Taking the four Sections mentioned above together, he arrived at the conclusions that a non-beneficial agreement was not included in the terms of the Section. In support of this conclusion, the Attorney General cited a prior opinion, 4 Opin. Atty. Gen. 47 (1842); where it was held that the Navy Department having accepted the offer of a partnership of which a Congressman was a member, the Department might continue the agreement when this Member relinquished all interest in it. Such an opinion would appear to settle all the waiver situations were it clear that the waiver in that instance was given after the contract was executed. The rule of interpretation in that case was stated as follows:

"The interest to disqualify a member from taking or an officer from offering, a contract, must, in my opinion, be an immediate (however indirect) personal interest in its benefits. That he may ultimately profit by the contract \* \* \* is not enough." (pp. 48-49)

It is, therefore, my opinion that where a member of Congress appears only as a lienholder, and no promise of any payment was made him originally, or if such promise was made he subsequently gives an absolute waiver of interest, the Government may safely proceed with the original benefit contract.

Whether the lienholder, a member of Congress, ultimately waives absolutely or only as to a percentage of the benefit payments, the essential character of his position and the independence and severability of the producer's agreement with the Government remains the same. Two added problems, however, arise in case of partial waiver. The first is whether the Government may accept the partial waiver as basis for releasing the part payment to the producer. In doing so, no increase in liability is incurred on the part of the Government. In connection with the performance already given, according to administrative determination, the full benefit payment is properly provided. Where there is no modification of the contract against the interest of the United States, determination of the basis upon which part of the benefit payment may be released is properly a matter of administrative discretion.

The second problem raised by the partial waiver is the understanding that the portion of the funds which would have been payable to the lienholder had he not been a member of Congress should be held apart until such time as Congress should direct its disposition. This would seem to raise no legal problem. It is an administrative matter which you may properly decide on grounds of policy.

Contracts in which a member of Congress appears as a producer raise greater difficulty. Such a contract is in effect an agreement made with a member of Congress in which he directly has a part or whole

interest. There he has a whole interest, only Congressional enactment can permit the Secretary to perform. Section 204 has been interpreted by the Attorney General, 26 Opin. Atty. Gen. 537 (1908) not to be in-operative because the contract entered into is in pursuance of a general Governmental scheme. It was stated in that opinion that the Section in question was plain in its meaning and only an explicit provision of a subsequent Act could avoid its effect.

Where, however, a member of Congress is joined with a lay third person as producer, the question remains whether performance with the third person may be continued after a waiver by the member of Congress. If it be assumed that the original contract was void, this does not give a complete answer to the question. The Secretary is empowered to provide benefit payments in connection with provisions for reduction in acreage by other voluntary arrangements besides agreements with producers. Where therefore a producer actually reduces acreage although pursuant to a void agreement in which he joined with a member of Congress, payment may be made him on the basis that reduction of acreage has been procured by a voluntary method in connection with which the Secretary may properly provide benefit payments.

With reference to agreements under Section 8(2) of the Agricultural Adjustment Act and Section 4(a) of the National Industrial Recovery Act, it may be safely asserted that none of the Sections of the U. S. Code mentioned above invalidate such agreements. The expressed terms of Section 204 are that an agreement is invalid if entered into on behalf of the United States with a member of Congress. However, as pointed out above, it has been interpreted to require that by the agreement the United States confer some benefit. 18 Opin. Atty. Gen. 286 (1885). In short, the contractual relationship in itself is not prohibited. Nor is a member of Congress deprived of sharing in the benefits of a strictly governmental function. The Federal Courts are open to members of Congress. Congressmen may obtain patents and invoke the administrative assistance of the Commissioners of Patents. The fact that such governmental action is couched in contractual form should not exclude members of Congress from cooperation therein nor deprive them of a part in the common gain. There is an obvious distinction between proprietary contracts entered into on behalf of the United States to which Section 204 of the U. S. Code clearly refers and agreements under either Section 8 (2) of the Agricultural Adjustment Act or section 4 (a) of the National Industrial Recovery Act which are not in any sense proprietary contracts but instruments within which a governmental function of alleviating the Country's economic distress and rehabilitating Agriculture and industry is performed.

The fact that for the purpose of carrying out agreements under Section 8(3) of the Agricultural Adjustment Act the parties thereto



are eligible for loans from the Reconstruction Finance Corporation may suggest itself as troublesome in view of the conclusion herein expressed. However, Section 204 of the U. S. Code does not apply to contracts with a Government owned corporation. In 33 Opin. Atty. Gen. 44 (1921) wherein a loan by the War Finance Corporation was in question, the Attorney General expressed the opinion that under the decision of U. S. v. Strang, 254 U. S. 491 (1921) a Government-owned corporation did not come within the provisions of Section 204. U. S. v. Strang was a decision involving Section 93 of Title 18, U. S. Code, which makes it a criminal offense for an agent of the United States to enter into an agreement with a corporation or other firm in which he has an interest. The Supreme Court decided that a Government owned corporation which acted under rules and regulations of the Government and its administrative body, the Shipping Board, was not the United States for the purposes of such criminal statutes. It may be concluded, therefore, that such loans as the Reconstruction Finance Corporation may grant do not come under the ban of Section 204, and the fact that a marketing agreement is a condition precedent to such a loan does not make the loan a benefit derived from the United States through such agreement.

You are advised accordingly.

Very truly yours,

(s) Seth Thomas,  
Solicitor.



No. 11

SCOPE OF THE TERM "AGRICULTURAL PRODUCTS"

The term "agricultural products" as employed in Section 12(b) of the Agricultural Adjustment Act, with relation to the removal of surplus, includes all products of the farm in their raw and natural state, and it may also include such products after processing and manufacture either upon the farm or elsewhere.

Opinion Section Memorandum No. 17  
Dated November 16, 1933.





November 16, 1933.

MEMORANDUM TO THE SECRETARY

Dear Mr. Secretary:

Reference is made to your memorandum of October 5, 1933, wherein you request an opinion on the scope of the term "agricultural products" as used in Section 12 (b), and as to whether the term as there employed will permit the Secretary of Agriculture to remove surplus agricultural commodities and the products thereof, or whether the Secretary is limited to a removal of agricultural commodities or products thereof.

As a preliminary inquiry it must be determined whether the term "agricultural products" is limited or controlled by phraseology employed elsewhere in the Act.

As stated in your memorandum, the term "agricultural products" appears only in Section 12 (b); Section 8 (1), which provides for reduction in production, employs the term "basic agricultural commodity", and the same term is used in Sections 9 (a) and 15 (d) providing for processing taxes. This term, "basic agricultural commodity", is defined in Section 11 as meaning "wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products". Section 8 (2) provides for marketing agreements with those engaged in the handling "of any agricultural commodity or product thereof", and Section 8 (3) for the issuance of licenses to those engaged in the handling "of any agricultural commodity or product thereof, or any competing commodity or product thereof".

The appropriation provided in Section 12 (b) is to be expended

"for expansion of markets and removal  
of surplus agricultural products and  
the following purposes under part 2  
of this title: Administrative expenses,  
rental and benefit payments, and refunds  
on taxes."

"Removal of surplus agricultural products" under this section is manifestly a purpose for the appropriation additional to the specified purposes under part 2. "Agricultural Products" under this section are, therefore, not necessarily limited to the products mentioned in Section 8 (2) and Section 8 (3).

The suggestion presents itself that by the enumeration of "agricultural commodities" and the "products thereof" in Section 8(2) and in Section 8 (3) a distinction is made between "Products" and "commodities" which requires that for the purposes of the Act "products" must mean the fruits of agriculture in a manufactured as distinguished from a raw state. It is to be noted that the term used in Sections 8 (2) and 8 (3) is "products" of a commodity and not the familiar and general term "agricultural products" which occurs in Section 12 (b). To be sure, agricultural commodities are to be distinguished from their products, but agricultural commodities themselves remain the products of agriculture.

The legislative history of the Act provides some guidance to the proper construction of the term "agricultural products". The original bill made no appropriation for expansion of markets or removal of surplus, except as benefit payments might be used for such purpose. In the Senate an amendment was introduced providing for:

"expansion of markets and removal of surplus basic agricultural commodities and their products."

The author, Senator George, explained to the Senate that in offering this amendment, he had chiefly in mind the expansion of markets for cotton. The present wording "expansion of markets and removal of surplus agricultural products" was contained in an amendment drafted in the Department of Agriculture, which was offered by Senator Smith, chairman of the committee in charge of the bill, and was accepted by Senator George as a substitute for his own amendment on assurance merely "that it covers the identical point that was made by him". (77 Cong. Rec., p. 1958). Explanatory statements made by a committee member in charge of a bill in course of passage may be resorted to as an exposition of legislative intent in a case where the meaning of a statute is otherwise obscure. Duplex v. Deering, 254 U. S. 443, 475 (1920). The suggestion of the legislative history is that the term used included agricultural commodities and their products.

By established usage, "agricultural products" unquestionably include all products in their raw or natural state which are the result of husbandry and the cultivation of the soil. "Agriculture" is commonly defined to include the cultivation of the soil and the rearing, feeding and management of live stock, including poultry. Flakles v. Hille, 83 Ind. App. 715, 149 N.E. 915 (1925); Gordon v. Buster, 113 Tex. 382, 257, S.W. 220. 221. (1923); Slycord v. Horn, 179 Iowa, 976, 162 N.W. 249, 252 (1917). A "product" is anything obtained as a result of some operation or work". (Funk and Wagnalls New Standard Dictionary). Accordingly, "agricultural products" include all the immediate fruits of husbandry.

"Agricultural products" include also articles and commodities manufactured or processed upon the farm from raw materials produced thereon, such as butter, cheese, cider, sausages, etc. An agricultural product does not cease to be such merely because refined or manufactured into other forms by the labor of those who are themselves engaged in agricultural pursuits.

"The common parlance of the country and the common practice of the country have been to consider all those things as farming products or agricultural products which have the situs of their production upon the farm, or which are brought into condition for the use of society by those engaged in agricultural pursuits, in contradistinction from manufacturing or other pursuits." District of Columbia v. Oyster, 15 D.C. 285, 286, 54 Am. Rep. 275.

Thus it has been held that, under a statute excluding persons dealing in "agricultural products" from license requirements, a city could not require a license of a farmer engaged in selling spare-ribs and sausages made from hogs raised by him. City of Higbee v. Burgin 197 Mo. App. 682, 201 S.W. 558, 559.

Such an extension of the term "agricultural products" follows from the wider definition of agriculture, given by Webster's New International Dictionary, as follows:

"In a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use. In this broad sense it includes farming, horticulture, and forestry, together with such subjects as butter and cheese making, sugar making, etc." (underscoring ours)

This definition is relied on in Northern Cedar Co. v. French, 131 Wash. 394, 230 P. 837 (1924) in reaching the conclusion that forestry products are properly embraced in a statute entitled "an act relating to commission merchants engaged in selling any agricultural product."

"Agricultural products" have also been held to include articles or commodities refined or manufactured elsewhere than on the farm from raw materials produced on the farm, as, for example, butter and cheese. State v. Public Service Commission, (Wis.), 242 N.W. 668 (1932). In Getty v. C.R. Barnes Milling Co., 14 Kan. 281, 19 P. 617 (1888) a distinction was made, in excluding flour from classification as an "agricultural product", between manufactured and non-manufactured products. The question of classification there arose,



however, in construing the scope of the charter of a milling corporation organized "for the conversion and disposal of agricultural products" and is therefore not an authority upon the definition of the term as used in a statute for purposes of a wholly different character.

In the Cooperative Marketing Act of 1926 (44 Stat. 802) agricultural products were defined as

"Agricultural, horticultural, viticultural, and dairy products, livestock and the products thereof, the products of poultry and bee raising, the edible products of forestry, and any and all products raised or produced on farms and processed or manufactured products transported or intended to be transported in interstate and/or foreign commerce."

In this Act the "cooperative marketing of agricultural commodities" was described as "including processing, warehousing, manufacturing" etc., indicating that practically every stage of the movement of agricultural products was embraced within the term. The Agricultural Marketing Act of 1929 (46 Stat. 11), enacted "to promote the effective merchandising of agricultural commodities in interstate and foreign commerce", contained no definition of the term "agricultural commodities". It has been stated (36 Op. Atty. Gen. 344, 1930) that the definition of "agricultural products" enacted in the Cooperative Marketing Act is strong evidence of the intention of Congress with respect to the meaning of the term "agricultural commodities" in the latter act. Whether this may be said with equal force as to the meaning of "Agricultural products" in the present Act, it is at least apparent that Congress in enacting legislation for the benefit of agricultural producers has recognized "agricultural products" as including for some purposes a wide range of processed and manufactured products.

I, therefore, conclude and so advise you that the phrase "agricultural products" has no fixed judicial meaning which is controlling in the construction of Section 12(b). It includes all products of the farm, in their raw or natural state, and may also include such products after processing and manufacture either upon the farm or elsewhere. For the purposes of the Agricultural Adjustment Act a liberal construction is proper to permit dealing with surplus products at such stage and in such manner as will insure the fullest benefit to the farmer.

Very truly yours,

(/s/ Seth Thomas

Solicitor.



No. 12

TURPENTINE GUM (NAVAL STORES)  
UNDER THE AGRICULTURAL ADJUSTMENT ACT

Turpentine gum is an "agricultural commodity"  
within the meaning of Section 8(3).

Opinion Section Memorandum No. 18a  
Dated November 17, 1933.



November 17, 1933.

MEMORANDUM TO MR. HISS

Replying to your memorandum of November 13, I submit my opinion upon the following:

QUESTION

May the Secretary enter into a marketing agreement with an association of producers of turpentine gum?

OPINION

Turpentine gum is an "agricultural commodity" within the meaning of Section 8 (3), and the Secretary may accordingly enter into a marketing agreement with those engaged in the handling of gum turpentine in the current of interstate commerce.

Statement of Facts

Turpentine gum is obtained from crude gum extracted from trees after the cutting of the bark and chipping of the fiber to excite the flow of sap. The first processing of the crude gum to secure the turpentine gum is a simple operation, usually performed by the producers in their own stills, preliminary to marketing. The gum turpentine and gum rosin are then the subject of further processing, in chemical manufacturing plants, to produce wood turpentine and wood rosin. Large numbers of individuals are seasonally engaged in "scraping" and gathering the crude gum, and in some sections these producers set out and grow the trees from which the gum is obtained.

Discussion

"Agriculture" in its narrow sense includes only the cultivation of the soil, but in its broader construction includes many other activities. See Op. Sect. Memo. No. 17 on scope of the term "Agricultural Products". In this larger sense it includes forestry. See Webster's New International Dictionary; Nelson's Loose Leaf Encyc. Accordingly

it has been held that forestry products are properly embraced in a statute entitled an act relating to "agricultural products". Northern Cedar Co. v. French 131 Wash. 394 P. 837 (1924).

The Naval Stores Act providing for the grading of naval stores (which include turpentine and rosin in various forms) by the Secretary of Agriculture indicates that Congress recognizes that naval stores are naturally grouped with, or among, agricultural commodities, for certain purposes.

Crude gum has been expressly classed as an agricultural commodity in an amendment to the Agricultural Marketing Act of 1929 which provides:

"The term 'agricultural commodity' includes, in addition to other agricultural commodities, crude gum (oleorosin) from a living tree, and the following products as processed by the original producer of the crude gum (oleorosin) from which derived: Gum spirits of turpentine and gum rosin, as defined in the Naval Stores Act, Approved March 3, 1923."

This amendment was passed in 1931 following the rendering of an opinion by the Attorney-General to the effect that the term "agricultural commodities" in the Agricultural Marketing Act did not include naval stores. 36 Op. Atty. Gen. 326 (1930). The Attorney-General rested his opinion on two grounds:

First. The definition given to "agricultural products" in the Cooperative Marketing Act of 1926 is strong evidence of the meaning of the term "agricultural commodities" in the later Agricultural Marketing Act. In the earlier act Congress had specifically included "the edible products of forestry". Further, the Agricultural Marketing Act, according to the declaration of policy in section 1, was to promote the marketing of "agricultural commodities and their food products". Both of these considerations favored a construction excluding non-edible commodities or products, such as gum turpentine and gum rosin, from the terms of the Act.

Second. Naval stores include not only the natural products of living trees but also

"'steam distilled' and 'destructively distilled' wood turpentine and wood rosin which are industrial products and could by no proper interpretations be included in the expression 'agricultural Commodities'". (36 Op. Atty. Gen. at 344).



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As to the second point, whatever its force in excluding distilled wood turpentine and wood rosin from classification as an "agricultural Commodity", it would not operate to exclude them from the wider classification of "agricultural commodities or products thereof".

As to the first point, the immediate passage of an amendment classifying crude gum as an agricultural commodity "in addition to other agricultural commodities" would seem to indicate that the opinion had not correctly interpreted the Congressional intent as to the scope of the term.

It is necessary to distinguish two cases which might seem to favor a narrower construction. In neither of these is the exact phrase "agricultural commodity" an issue, and it will be seen that the opinions turn upon distinctions which inhere in the term "cultivation" which is one of limited connotation.

In Union Naval Stores Co. v. United States, 240 U. S. 284 (1916) the United States was held entitled to recover the value of products manufactured from crude turpentine taken from land under an unperfected homestead entry, by a third party contracting with the homesteader. Had the gum been taken as an incident to the cultivation of the soil, it would have constituted no conversion. The court pointed out, however, that, unlike the actual cultivation of the soil which enhances the value of new land, the process of taking off turpentine destroys timber and thus depreciates the value of land in which the government has an interest, in case of abandonment of the homestead. The decision, proper as a construction of the term cultivation in the homestead act, has no application to the construction of another term in a statute having a wholly different purpose.

In Griffity v. Hulion (Fla.) 107 So. 354 (1925) it was held that one engaged in gathering turpentine is not entitled to a lien under a statute providing "for labor in raising crops". The statute provided for a lien "in favor of any person performing any labor in, or managing or overseeing, the cultivation or harvesting of crops, upon the crops cultivated or harvested". The court remarked that "the use of the words 'cultivation or harvesting', especially the word 'cultivation' removes all doubt on this subject", and pointed to the destructive character of turpentine production as distinguished from the beneficial effects of cultivation. Even as to this, the opinion reflects the difficulty experienced by the court in distinguishing an earlier case in which it had referred to the "turpentine crop" as the product of "labor and cultivation". Richbourg v. Rose, 53 Fla. 173, 44 So. 69. (1907). In the state in which this opinion was rendered the legislature has this year passed a statute classifying crude turpentine gum and gum spirits of turpentine and gum rosin as "agricultural commodities", "agricultural products" and "farm products". Georgia Session Laws 1933 Ch. 16297.

As appears in the Statement of Facts, it has become the practice of producers in some sections to set out and grow the trees from which the crude gum is obtained. Such a practice is not to be distinguished in any

essential feature from the planting and raising of trees yielding products of utilitarian value, such as nuts and fruits, commonly recognized as agricultural commodities or products.

In the Agricultural Adjustment Act no words are used to warrant limiting the term "agricultural commodity or product thereof" to eliminate any commodities, or products of such commodities, which are embraced within the term as liberally construed. The purpose of the act, which is broadly remedial, calls for such liberal construction. The production of turpentine gum is carried on by large numbers of individuals under conditions analagous to those confronting farmers generally, and it is reasonable to conclude that Congress, which in previous legislation has extended the benefits of agricultural legislation to such producers, did not intend to exclude them from the comprehensive program provided for in the Agricultural Adjustment Act.

Francis M. Shea  
Chief, Brief and Opinion Section.

No. 13

RATE OF PAYMENT FOR PUBLICATION OF  
REPORTS OF CROP CONTROL ASSOCIATIONS

The cost of the publication of allotment and production reports is an administrative expense of the County Crop Control Associations; in contracting with newspapers to publish such reports the Associations are not bound by state statutes fixing the rates for "legal publications" but may contract for the same subject to the provisions of the articles of association under which they are established, and to such regulations as may be prescribed by the Secretary.

Opinion Section Memorandum No. 19.  
Dated November 28, 1933.





November 28, 1933.

MEMORANDUM TO MR. FRANK

I submit, herewith, my opinion on the question raised by Mr. Stedman, Director, Division of Information and Publicity, in his memorandum to you dated November 17, 1933:

QUESTION

Are reports of allotments and production published by County Wheat Control Associations and County Corn-Hog Production Control Associations "legal publications" for which the publishers are entitled to be paid at the so-called "legal" rates?

OPINION

Such reports are not "legal publications," in the sense of being required by law, but are in the nature of administrative expenditures of the local control associations. The rate at which they should be carried by local newspapers is a matter to be determined by agreement.

FACTS

The "Handbook of Organization and Instructions" prepared by the Wheat Section and issued in August, 1933, as a guide for local agencies in applying the Agricultural Adjustment Act to wheat, states, on page 2, that "these allotments will be published in the county press." On page 36 there appears the following statement: "Lists of contract signers, together with their accurate allotments, will be published in local newspapers." Form No. W -20 for the publication of production and acreage statements has accordingly been furnished to the County Wheat Control Associations, for their "convenience." In this it is stated that the information called for "MUST BE PUBLISHED SO THAT ALL PRODUCERS MAY HAVE FULL INFORMATION ON REPORTED PRODUCTION, AND SO THAT THEY MAY CHECK WITH THEIR COMMUNITY COMMITTEE REGARDING ANY INACCURATE REPORTS." Under the heading "Suggestions On Assigning the Publication of the Statements", two plans are proposed, but it is stated that "final decision as to how this publication shall be placed with the newspapers is left to the County Wheat Control Association."

In a similar form now in the course of preparation for the County Corn-Hog Production Control Associations a paragraph under the heading "County Corn-Hog Production Association please note" reads as follows:

"Responsibility for placing this required publication with the paper or papers of each county rests with the County Control Association. Every effort should be made to place the space with the papers on as fair and equitable a basis as possible. The cost of publication which is to be borne by the County

production Association should be kept to as economical a figure as possible. At the same time all papers in the county should be considered in allotting the space."

It is reported that certain newspapers and newspaper associations take the position that these reports are "legal publications" and that they are, therefore, "entitled" to be paid at the "legal" rate, which differs in the different states, but is uniformly higher than the prevailing rates for commercial advertising.

## DISCUSSION

### I

The publication of such production reports is not required as a matter of law.

There is nothing in the Agricultural Adjustment Act which requires the publication of reports of this character, nor has the Secretary issued regulations under the power conferred upon him in Section 10 (c) of the Act to make necessary regulations "with the force and effect of law," to make such publication mandatory. No consequences of a legal nature attach to the publication or non-publication of these reports.

It is evident from the statement of facts which appears above that the publication of production reports has been undertaken as an aid to administration. The aim is to secure increased participation in the reduction programs and to utilize the force of public opinion to insure performance of the contracts entered into by the producers. The statement which appears in Form No. W-20 that publication of the information called for is "an essential part of the wheat adjustment program" is merely descriptive of the vital relationship existing between publicity and the success of the program. The statement that the information "must be published so that all producers may have full information" is likewise descriptive. Even the most positive instructions to the Wheat Control Associations to publish such reports would not give to the publications themselves a special legal character, and the failure of the associations to carry out such instructions, however, it might affect administration relationships, would not affect the validity of the program from a legal standpoint.

### II.

In the absence of any statute fixing the rate to be paid for such publications, the rate is a matter of agreement to be entered into by the local control associations subject to the regulations prescribed by the Secretary.

There are numerous state statutes defining "legal publications" or "legal notices" and fixing the rate of payment for the same. Thus the term "legal notice" may be defined as, "embracing every summons, order, citation, notice of sale, or other notice, and every other advertisement of any description required to be published by law, or in pursuance of any law, or of any order of any court." Wis. Rev. Stat. Sections 4275-6. Such statutes are valid in fixing the rate which the state must pay for notices of this character. However, under accepted conceptions of the private character of newspaper enterprises, newspapers cannot be required to carry such notices, nor can they be deprived of their freedom of contract in respect to the rate at which they will accept advertising. Commonwealth v. Boston Transcript Company, 249 Mass. 477, 144 N.E. 400 (1924); Record Publishing Company v. Monson, 123 Wash. 569, 213 P. 13 (1923); and see Bohan v. Ozaukee County, 88 Wis. 498, 60 N.W. 702, 703, (1894).

State statutes may, therefore, fix rates which must be paid by the state or by municipalities within the state; As to private persons, it has been held that although a rate fixed by statute may control, on the theory of implied contract, in the absence of express contract, it may not be fixed so as to exclude the right to contract at a different rate. Record Publishing Co. v. Monson, *supra*. Certainly no state by statute can limit the rates to be paid by federal agencies for services as to which private persons may freely bargain. As to any limitation upon such agencies, therefore, it is necessary to look to the federal statutes.

Section 322 of Title 44, U.S.C.A. provides;

"Rate of payment for advertisements, notices, and proposals. All advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the Government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise. But the heads of the several departments may secure lower terms at special rates whenever the public interest requires it. (June 20, 1878, c. 359, Sec. 1, 20 Stat. 216)"

This statute does not control in the present instance. Without venturing an opinion as to whether the county associations are acting as agents for a department of the government, the publications in question are not "required by law." Were this conclusion erroneous, however, the effect of the statute would be merely to limit the amount to be paid to "a price not to exceed the commercial rates charged to private individuals, with the usual discounts." Under the conclusion noted, the statute is of interest merely in indicating the policy of the Federal government established as a needed protection of public expenditures.



The same policy is incorporated in Section 52, Title 20, of the District of Columbia Code, which limits the amount to be paid for legal advertising by the government of the District of Columbia to rates not exceeding "those charged to individuals or commercial interests for similar advertising in the District of Columbia."

In conclusion, it is my opinion that the cost of the publication of these reports is an administrative expense of the County Control Associations, and that, in contracting with newspapers to publish such reports, the County Control Associations are limited only by the provisions of the articles of association under which they are established, subject to such regulations as may be prescribed by the Secretary.

FRANCIS M. SHEA,  
Chief, Brief and Opinion Section.



No. 14

INCLUSION OF BAKING POWDER IN  
TERMS OF EXECUTIVE ORDER NO. 6345

Baking powder is properly included in the term "all substances or preparations used for food or entering principally into the composition of food," as used in Executive Order 6345, delegating to the Secretary power with respect to industries engaged in the handling of such substances or preparations.



November 29, 1933.

MEMORANDUM TO MR. PRESSMAN

I submit herewith my opinion on the following question raised in the memorandum of Mr. Barkalow dated November 27, and transmitting a memorandum from Mr. Dusick of the Food Products Section dated November 18th:

QUESTION:

Is the baking powder industry within the jurisdiction of the Secretary, for the purpose of issuing a code of fair competition under the National Industrial Recovery Act, by virtue of Executive Order No. 6345, October 20, 1933?

OPINION

Baking powder is properly included in the term "all substances or preparations used for food or entering principally into the composition of food." The baking powder industry is accordingly within the jurisdiction of the Secretary by virtue of the Executive Order, delegating power with respect to industries principally engaged in the handling of such substances or preparations.

Statement of Facts

The Encyclopedia Britannica gives the following description of baking powder:

"A prepared mixture to replace yeast in baking, containing as active ingredients, customarily, sodium bicarbonate (baking soda), and either potassium acid tartrate (cream of tartar), tartaric acid, or potassium aluminum sulphate (alum) or other material which, when moistened, acts as an acid to liberate carbon dioxide from the baking soda. Baking powders frequently contain starch, flour or other inert powdery materials, which serve to prevent premature reaction between the other ingredients."

It appears that in the manufacture of baking powder, corn-starch, according to some formulae, constitutes as high as 47.59% of the ingredients used, tartaric acid 5.97% and cream of tartar 59.86%.

Pertinent sections of Executive Order 6345, October 20, 1933.

The Executive Order provides that in addition to the trades, industries, or subdivisions thereof enumerated in the Executive Order of June 26, 1933, there shall be included:

- "(1) Industries, trades, or subdivisions thereof (including agricultural produce and commodity exchanges and similar organizations) engaged principally in the handling of any of the following: (a) . . . . . (b) human and animal food (including beverages, confectionery, and condiments) and all substances or preparations used for food or entering principally into the composition of food."

#### Discussion

1. "Food" is generally defined as "that which is eaten or drunk for nourishment". Baking powder is not fit for consumption as food, and it is manufactured as an aid in the preparation of food and not for any nutritive values which the powder itself contains. It does, however, become a component part of the dough in which it is used.

Accordingly, baking powder has been held to be an "article of food" within the meaning of a state Pure Food and Drugs Act. Royal Baking Powder Company v. Emerson. 276 Fed. 429 (1920). In this case the contention was made that baking powder did not fall within the term "article of food" for the reason that it is not itself food but merely an agency for "raising" the bread. The court stated (p. 433):

"The term, any 'article of food' is sufficiently broad to cover any article ordinarily eaten or drunk, whether it be so used alone, or as a part of some mixture or compound which is eaten or drunk. Neither baking powder nor flour is eaten as such, but both are intended as components of bread. The purpose of the statute requires that this broad meaning be given the above term, unless the statute is to be materially crippled in its intended effect."

In the course of its opinion the Court gave consideration to the construction of the National Food and Drugs Act, 34 Stat. 768, which contains provisions against adulteration and misbranding. The term "food" in Section 6 is defined as including "all articles used for food, drink, confectionery, or condiment, by man or other animals, whether simple, mixed or compound." Section 8, dealing specifically with misbranding, is made applicable "to all drugs, or articles of food, or articles which enter into <sup>the</sup> composition of food." In Royal Baking Powder Co. v. Emerson, the manufacturer claimed that the State statute was modeled upon the National Food and Drug Act and that baking powder was embraced in that Act only as to Section 8 under the phrase "articles which enter into the composition of food." In rejecting this argument, the court found support in a previous decision which involved the point indirectly, and also in long continued administrative practice. In Hipolite Egg Co. v. United States, 220 U.S. 45, preserved eggs have been held to be within the general definition of "food" in the Act although such eggs are not of themselves food, or fit or intended to be used alone as food, but are designed for use with flour and other articles in making cakes. The question as to the inclusion of gelatine



within the definition of "food" has been ruled upon by the Secretary of Agriculture as follows: (Food Insp. Dec. No. 48)

"It is held that the products commonly added to foods in their preparation are properly classed as foods and come within the scope of the Food and Drugs Act."

Baking powder was held not to constitute "food" under the English Sale of Food and Drugs Act of 1875. James v. Jones, 1.Q.B. 304 (1894). But is "article of food" under the Sale of Food and Drugs Act of 1899, Section 26, which includes flavoring matters and condiments. 15 Halsbury's L. Eng. 5, Note.

Thus, under the liberal interpretation which has been applied to pure food legislation, baking powder may well be regarded as falling within the phrase "human and animal food" as used in the Executive Order.

2. Whether or not baking powder can be classed as "food" within the terms of the Executive Order of October 20th, it is certainly embraced within the term "all substances or preparations used for food or entering principally into the composition of food."

It will be observed that the term "used for food" is the same as that which appears in Section 6 of the National Food and Drugs Act which has been applied as covering ingredients added to foods in their preparation. If the term had been "used as food", under a narrow construction of the word "food", it might be construed to exclude articles not in a form suitable for human consumption or not of high nutritive value in themselves. But the term chosen is not only broad enough to include, under any natural construction, all articles used for food purposes or entering into the manufacture of food, but it has been so construed in practice and has thereby acquired an interpretation which rests upon usage and general understanding.

All substances or preparations "entering principally into the composition of food" are also embraced. Baking powder is used for blending with food materials in order to produce the reaction of "raising" dough. This is not only its principal but, it is understood, its sole use. No apparent reason exists for distorting this phraseology as though it read: "constituting the principal part of a food or food product."

3. Viewing the Executive Order in the light of its purpose, which is "to avoid conflicts in the administration" of the Agricultural Adjustment Act and the National Industrial Recovery Act, it is evident that this purpose will be furthered by placing the formulation

and administration of codes relating to the baking powder industry under the same authority which deals with the manufacture of all forms of human and animal food and substances entering generally into the composition of foods.

Francis M. Shea.

Chief, Brief and Opinion Section.

No. 15

RIGHT TO TRIAL DE NOVO  
AFTER REVOCATION OF LICENSE

A person whose license issued under Section 8(3) of the Agricultural Adjustment Act has been revoked is not entitled to a trial de novo in the federal courts.

Opinion Section Memorandum No. 21  
Dated November 29, 1933.





November 29, 1933.

MEMORANDUM TO MR. FRANK

In accordance with your recent request I submit my opinion on the following question:

QUESTION AND OPINION

Section 8 (3) of the Agricultural Adjustment Act, provides:-

"The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law."

The question you propose is whether under this provision a licensee whose license has been revoked is entitled to a trial *de novo* in the Federal Courts. It is my opinion that he is not so entitled.

SUMMARY OF DISCUSSION

- I. The doctrine of the Ben Avon case, holding an appellant from administrative determination entitled to an independent re-examination of the evidence in the Court, is not applicable to this procedure.
  - (a) The Ben Avon case dealt with the rate-fixing order of a State Public Utilities Commission and involved State due process, whereas this proceeding is a license revocation involving Federal due process.
  - (b) Fagg Bros. & Moorhead v. U. S., dealing with rate-fixing by the Secretary of Agriculture, is contrary to the Ben Avon case.
- II. Crowell v. Benson, holding that an appellant from an administrative proceeding may present new evidence for the first time in court, is inapplicable to the present case.
  - (a) The Crowell case relies on the judiciary article of the Constitution which has rarely been used in the theory of judicial review.
  - (b) The Crowell case concerns itself with a more characteristically judicial proceeding than that of license revocation.

- (c) "Jurisdictional facts" in the Crowell use of the term will be difficult to find in the proceedings under Section 8 (3) of the Act.
- (d) The Courts are likely to insist upon an appellant from administrative determination exhausting his administrative remedy. This means presenting all his evidence before the administrative body.

### DISCUSSIONS

1. The doctrine of the Ben Avon case holding an appellant from administrative determination entitled to an independent re-examination of the evidence in the Court is not applicable to this procedure.

- (a) The Ben Avon case dealt with the rate-fixing order of the State Public Utilities Commission and involved State due process, whereas this proceeding is a license revocation involving Federal due process.

The phrase "trial de novo" has been used in two connotations in recent cases dealing with administrative problems. One is exemplified by the case of the Ohio Valley Water Company v. Ben Avon Borough; 251 U. S. 542; 40 S. Ct. 583; wherein it is said that the appellant, protesting the constitutionality of a rate-fixing order of a state regulatory commission, is entitled as a matter of due process to a trial de novo in a court or judicial body. Trial de novo, however, in that case, as well as in some cases following, also dealing with State Public Utility Commissions (Bluefield Water Works & Improvement Co. v. Public Service Comm. of W. Va., 262 U. S. 679, 43 Sup. Ct. 675 (1923); Ohio Utilities Co. v. Public Utilities Comm. of Ohio, 267 U.S. 359, 45 Sup. Ct. 259 (1925)), means simply the independent re-examination of the evidence on the issue of confiscation by the Court to see whether the Court itself would have reached the same determination. There are some old cases dating back to the inception of the Interstate Commerce Commission which regard the function of a Court on reviewing an administrative determination to be that of listening to new evidence, but those cases date back to an era when an appeal from a determination of an administrative tribunal was regarded more as a collateral attack on the Commission itself than as an appellate review. The whole situation was changed by Congressional grant of much broader powers to the Interstate Commerce Commission; and the innovation that the Ben Avon case made was in rulings of the Court (arising mainly in Interstate Commerce Commission cases) which had held that the function of the Courts was simply to see whether there was any evidence to support the Commission's order and not to re-examine the evidence from its own viewpoint.

So far as can be determined from the precedents in the field, the Ben Avon case has been limited to the precise issue of rate-fixing, which has always been thought of as a judicial function. It must furthermore be emphasized that the Ben Avon case has no direct application to a Federal administrative tribunal. The only argument

that can be made for its applicability is the fact that the due process clauses of the 5th and 14th amendments have, with some significant exceptions, received substantially the same interpretations, but this will probably not be the case here.

- (c) Tagg Bros. & Moorhead v. U. S., dealing with rate-fixing by the Secretary of Agriculture, is contrary to the Ben Avon case.

It is significant to note that in the case of Tagg Bros. & Moorhead v. U. S., 280 U. S. 420 (1930), where the Secretary of Agriculture had fixed the rates to be charged for certain stockyard services, the theory of appellate review made no reference whatsoever to the Ben Avon case and its successors.

"---mere admission by an administrative tribunal of matters which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, or mere error in reasoning upon evidence adduced, does not invalidate an order made by it. United States v. Abilene & Southern Ry., 265 U. S. 274, 288; Northern Pacific Ry. Co. v. Department of Public Works, 268 U. S. 39, 44. It has been settled in cases arising under the Interstate Commerce Act that if an order rests upon an erroneous rule of law, Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42; or is based upon a finding made without evidence, Chicago Junction Case, 264 U. S. 258, 263; or upon evidence which clearly does not support it, Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541; New England Divisions Case, 261 U. S. 184, 203; Colorado v. United States, 271 U. S. 153, 166; the order must be set aside. These rules are applicable also to suits arising under the Packers and Stockyards Act." (At p. 442.)

Tagg Bros. & Moorhead v. U. S. would in itself seem to be a complete answer to whatever applicability the Ben Avon case might have in the situation like the present, because there in a Federal rate-fixing case the doctrine of the Ben Avon case was ignored. The Ben Avon doctrine, on its initial appearance, received a great deal of criticism at the hands of legal theorists and it may be that the Supreme Court will not be over-anxious to stress this form of limitation of administrative action. Further arguments may be derived by implication from the next point, wherein it will be sought to point out that the case of Crowell v. Benson is likewise inapplicable.



II. Crowell v. Benson, holding that an appellant from an administrative proceeding may present new evidence for the first time in court, is inapplicable to the present case.

- (a) The Crowell case relies on the judiciary article of the Constitution which has rarely been used in the theory of judicial review.

The Crowell case, 285 U. S. 22; 52 S. Ct. 285 involved a trial in the Workmen's Compensation tribunal set up by the Longshoreman's and Harbor Workers' Compensation Act and the Court held that on the fundamental jurisdictional issues of whether the accident took place within navigable waters of the United States and whether an employer-employee relationship existed, the defendant employer was entitled to a trial de novo in the Federal courts. Trial de novo in the Crowell case definitely meant the introduction of new evidence before the court, whereas, as pointed out, in the Ben Avon case it had meant a re-examination of evidence already proffered.

It is my opinion that the Crowell case revolves around the interpretation of the judiciary article of the Constitution and not the due process clause. Thus the majority opinion at page 49 states that the contention under Article 3 "presents a distinct question." It also meticulously disposes of the due process objections before coming to the issues with which its application of Article 3 is concerned. Certain remarks on pages 56 and 61 may indicate that the court was not entirely clear as to whether it was resting the case on the judiciary article alone, but the whole tenor of the majority opinion seems to indicate that that was the main anchor of the judgment. That the fourth point in Mr. Justice Brandeis' dissent was devoted to disposing of the due process argument may be explained either as an instance of historical scholarship or as due to a feeling on his part that the due process and judicial power arguments merge.

That the Crowell case is based on the judiciary clause and not on due process is a point of more than theoretical significance. It means that in the only situation where new evidence has been allowed on review, this has been primarily by virtue of the fact that the sovereignty of the courts was being impinged upon by administrative action and not on the theory that the litigant before the Commission was being deprived of due process. Mr. Justice Hughes' fear in Crowell v. Benson was that of a bureaucratic usurpation of power where Congress had intended no such power to be conferred.

The jurisdictional issues of fact which ought to be litigated de novo, are described by Chief Justice Hughes as constitutional, fundamental and pivotal to the operation of the statute. As far as fundamentality is concerned, it is apparent that the Supreme Court considered the navigable waters and the relationship of employer-employee the two most important factors under the Act. The issue of whether navigable waters were involved is therefore reviewable de novo because a distinct constitutional permissive grant of jurisdiction



over admiralty has been conferred upon the courts by the judiciary clause. The case for the employer-employee relationship as a similar issue is not so clear because there the constitutional basis of jurisdiction exists in the fact that if an employer-employee relationship did not exist, the whole enactment would be declared unconstitutional on due process grounds. In short, the employer-employee relationship is a constitutional jurisdictional fact in the sense that its presence gives wider range to Congressional power which would be more restricted if the relationship did not exist.

There are further theoretical perversities in the viewpoint of the Court in the Crowell case which it is not within the scope of this brief memorandum to enter into. For the present, it may be stated that the doctrine of Crowell and Benson may very well not be slated for judicial expansion and is therefore probably not going to be applied to the section of the Act here being considered. For one thing, except for a dissent by Mr. Justice Brewer in the Ju Toy case, 198 U. S. 253, 273, 35 Sup. Ct. 644, 647 (1904) the judiciary article had been revived for the first time since the case of Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1855). In a situation analogous to the present, the fact that theoretical complications, of a type with which the courts have no adequate conceptual apparatus for dealing, are raised by the Crowell case may be ample reason why further use of it will be restricted.

- (b) The Crowell case concerns itself with a more characteristically judicial proceeding than that of license revocation.

The doctrine of trial de novo, both in its Ben Avon and Crowell v. Benson formulation, has arisen in controversies more characteristically judicial than that which is envisaged under the Act. Rate-fixing has been the arch type of administrative entry into spheres hitherto recognized as judicial, and has therefore provoked extreme judicial surveillance. Workmen's Compensation has also been an effort to relieve the courts of a burden. Such a situation is not characteristic of either the granting of licenses or their revocation. Even in the sphere of Workmen's Compensation the Supreme Court has shown no particular eagerness to extend the Crowell v. Benson doctrine. Thus in the case of Dahlstrom Metallic Door Co., 284 U. S. 594, 52 Sup. Ct. 203 (1952), aff'g. 256 N. Y. 199, 176 N.E. 141, the Supreme Court held that finality could be given to a State Compensation Commission's award of damages without denying due process. No provision at all for judicial review was contemplated in the New York statute and yet the court passed on the case without even writing a formal opinion. Incidentally, it may be said that this case, involving as it does State due process with respect to a Compensation Commission's award, is another argument for the hypothesis that the Ben Avon case will not receive further extension at the hands of the Supreme Court.

The opinion of Crowell v. Benson itself distinguishes between cases in which private rights are in controversy, which are traditionally the most characteristically judicial proceedings, and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of executive or legislative departments. Crowell v. Benson does not purport to extend to the latter type of case. The court refers to this distinction as made in Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 quoting the opinion in that case to the effect that "The mode of determining matters of this class is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." The court then proceeds as follows: "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the Congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the Post Office, pensions, and payments to Veterans."

The present case is one arising between the Government and persons subject to its authority in connection with the performance of constitutional functions, to wit, the regulation of interstate commerce and exercise of the credit powers of the Federal Government. It is certainly not a controversy between private persons. The distinction which the Murray's Lessee opinion draws is not internally coherent but if it obtains at all it serves to distinguish Crowell v. Benson from the instant case.

- (c) "Jurisdictional facts," in the Crowell use of the term, will be difficult to find in the proceedings under Section 8 (3) of the Act.

Another major difficulty will be found in the question of what it is that can be pointed out as a jurisdictional fact. The fundamental constitutional basis of the Agricultural Adjustment Act is the interstate commerce power and the credit power. It will probably be exceedingly difficult for litigants to conceive of evidentiary issues under either power which the court will consider in the same way as it did the spatial problem of where the injury occurred and the factual problem of the existence of the employer-employee relationship. The issue that is to be presented to the Federal Court must be one of fact upon which competing evidence is present and it is suspected that the evidentiary issues under the interstate commerce power and the credit power will usually be resolved, so that the whole question remaining is one of law or, at best, a question what inferences can be drawn from established facts. Where the stage is not set for the introduction of new evidence on a fundamental, constitutional and jurisdictional issue, the influence of Crowell v. Benson is not likely to be extended.



Furthermore, as far as raising an argument analogous to the employer-employee argument of the Crowell case is concerned, it should be rendered that the due process clause was relied on in that case in its substantive aspect and not in its procedural aspect. Therefore, to produce a relationship of equal significance under the license provisions of the Act, it will be necessary for the appellant to present a line of cases in which it had been held that the exercise of administrative power was only justified by virtue of a peculiar relationship.

- (d) The Courts are likely to insist upon an appellant from administrative determination exhausting his administrative remedy. This means presenting all his evidence before the administrative body.

Another consideration which will become increasingly important with the expanding tide of government interference in private affairs, is that courts are quite likely to resent being swamped by new evidence which has been withheld from the administrative tribunal, very often merely for dilatory purposes. There have been several indications of such an attitude in the past and this attitude is likely to be accentuated.

Thus, in Cincinnati, New Orleans, and Texas Pacific Ry. Co., 162 U. S. 184, 196, 15 Sup. Ct. 700, 705 (1896); Manufacturer's Ry. Co. v. U. S., 246 U. S. 457, 490, 38 Sup. Ct. 383, 392 (1918), the appellant was subjected to verbal censure by the Supreme Court. In other cases the fact that the appellant lost its case was probably due to his tardiness in pre. See Bartlett v. Kane, 16 How. 263 (1853); U. S. v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621 (1904). Even where the appellant presents his new evidence in perfect good faith, a court oppressed by overmuch business is quite likely to remit the evidence back to the administrative tribunal to have it summed up. (Cf. Federal Trade Comm. v. Curtis Publishing Co., 260 U. S. 568, 43 Sup. Ct. 210 (1923); Hankin, Conclusiveness of the Federal Trade Commission's Findings as to Facts (1925) 23 Mich. L. Rev. 233, 245 et seq.; Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336 (1900); Lincoln Gas and Electric Light Co. v. City of Lincoln, 223 U. S. 349, 32 Sup. Ct. 271 (1912). Such a procedure is mandatory in recapture evaluation proceedings before the Interstate Commerce Commission. Los Angeles & S. L. R. Co. v. U. S., 4 F. (2d) 736 (S.D. Calif. 1925)

There is another connection in which the doctrine of exhaustion of administrative remedies can arise. Specifically, it may be argued that the question of whether the administrative body has been keeping within its appropriate jurisdictional sphere should have arisen in the stage of granting the license. The courts may well be averse to considering it for the first time upon revocation, particularly if the parties to the license have been allowed complete opportunity to be heard to object to its granting. If interstate commerce existed for the purpose of granting a license, it is probably there for the purpose of revoking it.

It is therefore my conclusion that no new evidence will be permitted to be interpolated for the first time in a court and that the court in reviewing the action of the Secretary of Agriculture in suspending a license, will limit itself to the inquiry of whether there was any evidence in the record to justify his action.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Legal Division.



No. 16EFFECT OF LICENSES ON PRE-  
EXISTING CONTRACTS OF MUNICIPAL AGENCIES.

In view of the doctrine of the immunity of Government instrumentalities, it would be unsafe to insist that a license issued under Section 8(3) supersedes the prior contracts of a municipal general hospital and detention home.

Opinion Section Memorandum No. 22  
Dated November 29, 1933.



November 29, 1933.

MEMORANDUM TO DR. CLYDE L. KING

You have referred to me for my opinion a specific factual situation which involves the whole legal problem of the effect of marketing agreement and licensing provisions under the Agricultural Adjustment Act on pre-existing governmental contracts. The general question presents very serious policy and legal problems which will take some time to work out in all their complexity and I, therefore, limit myself to a preliminary memorandum on the facts you have presented. Because of the complicated nature of the problems raised under both state and federal law, this preliminary memorandum cannot be offered as a dogmatic statement but is offered as a tentative series of suggestions which will probably be confirmed in the more complete memorandum that I shall shortly submit.

The specific cases presented involve contracts for the delivery of milk to the General Hospital, owned and operated by the city of Knoxville, and the Detention Home, presumably also owned and operated by the city. The General Hospital and, if my assumption be correct, the Detention Home are, therefore, municipal agencies and the general legal problem is the extent to which the federal government can impose a burden interfering with the operation of such agencies. The majority of the cases on federal interference with the operation of municipal agencies (it must be understood that municipal agencies are considered state instrumentalities) have arisen in the field of taxation. The rule used to be quite rigorously adhered to that the federal government could not tax any state instrumentality, and has been stated as an absolute rule permitting of no deviation once it is determined that an instrumentality is actually involved. Indian Motorcycle Co. v. U. S. 283 U. S. 570 (1931); Johnson v. Maryland 254 U. S. 51. The basis of this rule was the whole argument of McCulloch v. Maryland (4 Wheat. 316) to the effect that the power to tax was the power to destroy; and a governmental function of a state sovereignty, if it be a proper one under the Constitution of the United States, was entitled to unimpeded exercise. Parenthetically it may be remarked that there are indications that the Supreme Court has departed from this absolutist rule and that it will condescend to hear evidence on the issue of the heaviness of the burden imposed on the state instrumentality -- it has even indicated its unwillingness to take judicial notice of the extent of such interference. Willcuts v. Bunn, 282 U. S. 216, 51 Sup. Ct. 125.

Under the Agricultural Adjustment Act it may be argued that the power to license is the power to destroy. To be sure, it is not the state that is being licensed but private contractors with the state. However, it has been held that the incidence of a tax on the private party dealing with the state instrumentality made the tax none the less a burden on such state instrumentality if it tended to burden the functioning of the state. U. S. v. King Co., Wash., 281 Fed. 686 (CCA 9th 1922); Panhandle Oil Co. v. Knox, 277 U. S. 218 (1928). If the

state is compelled under the present circumstances to pay an increased price for the milk it requires, it may not be able to perform its other responsibilities in connection with the General Hospital and the Detention Home. Besides this, a strain will be imposed upon its general revenue structure which, in the present precarious situation of many state budgets, will operate as a serious obstruction to the proper exercise of state functions. Even if the enforced increase in price schedule were not to have this undesirable effect, the reasoning of the courts would still be unaffected, because they will not be impressed by the measure of the tax before them or the extent of the disruption caused by the enforcement of specific license provisions as they will be by the possibility that the federal taxing power or the federal licensing power may, at some time in the future, be carried to the extreme where it would bankrupt the state.

Latterly, however, the courts have had to face the problem of state governments engaging in businesses which compete with private activities and arrogating to themselves functions of a distinctly commercial nature. Thus South Carolina decided that as a mode of controlling the traffic in liquor it would establish a state liquor dispensary. It was held that the federal government could impose a tax on the business. South Carolina v. U. S., 199 U. S. 437 (1905). This was the predecessor of a line of cases which have established the distinction, for taxation and other purposes, between the governmental and the proprietary or quasi-private activities of a state. The holdings have been to the effect that proprietary activities of a state may be taxed by the federal government, whereas strictly governmental operations are immune therefrom.

The major source of difficulty has been a problem of definition. "Proprietary" and "governmental" may have, in connection with the doctrine of non-interference with coordinate governmental instrumentalities, an entirely different significance than they have in other fields of the law. The distinction between proprietary and governmental has been mostly elaborated in cases dealing with the contracted or tort liability of municipal or state agencies. If we are to assume that these two terms have the same meaning in the field of constitutional law as they do in the field of tort law, I think it can hardly be doubted that both the General Hospital and the Detention Home would be considered governmental activities. Jones v. District of Columbia, 279 Fed. 188 (App. D. C. 1922). This, of course, is subject to a check-up against the local law involved. In this case, for instance, it would be desirable to investigate the Tennessee law to see whether it has diverged in this particular from the general rule which, as I have stated, would place hospitals and jails in the category of "governmental" instrumentalities. Divergencies are to be found from jurisdiction to jurisdiction and very often rather subtle distinctions have to be made. Thus, a water-works system would be considered proprietary even where the description is employed to exempt it from federal taxation, if its function be to dispense water to the members of the community. Blair v. Byers, 35 F. (2d) 326 (CCA 8th 1929); cf. Los Angeles Gas & Electric Corp., 251 U. S. 32 (1919); but cf. A. T. Jergens Trust v. Commissioner of Internal Revenue 61 F. (2d) 92 (CCA 9th 1932). If, however, its functions be to provide a supply of water for fire fighting purposes, it is deemed governmental. Metcalf v. Mitchell, 299 Fed. 812 (D. Mass. 1924). Holdings exist in the



lower federal courts, with respect to the specific issue of federal taxation, that ferries are governmental instrumentalities and, therefore, tax exempt (U. S. v. King Co., Wash. 281 Fed. 686 (CCA 9th 1922)) and the same has been said for street railway systems. Frey v. Woodworth, 2 F. (2d) 725 (E.D.Mich.S.D.1924). The supply of electricity is a proprietary activity (Maumee Valley Electric Co. v. Schlesinger, 33 F. (2d) 318 (S.D. Ohio E.D. 1928)); cf. Los Angeles Gas & Electric Corp. 251 U. S. 32 (1919), as are also the supply of liquor above mentioned (South Carolina v. U. S., supra), the activities of a city housing corporation (Garden Homes Co. v. Commissioner of Internal Revenue 64 F. (2d) 593 (CCA 7th 1935), and the business of a state bank (State of North Dakota v. Olson, 33 F. (2d) 848 (CCA 8th 1929)). No decided case exists in the field of federal interference with a state instrumentality which comes closer than those just enumerated to the situation of the Knoxville General Hospital or Detention Home. It has been suggested that whether an activity is governmental will be determined by deciding whether it is an exercise of the police power of the state. Jones v. District of Columbia, 279 Fed. 188 (App. D. C. 1922). The invalidity of this suggestion will be apparent from the South Carolina v. U. S. case above cited, where it was decided that a business obviously intended as a measure of control was in effect a proprietary activity and could be taxed as such (at p. 453). It will be difficult to remove completely from any business that a state enters upon the notion that it is to some extent exercising its police power by engaging therein.

It has been decided that for purposes of state taxation a veterans' hospital is a federal governmental instrumentality and, therefore, tax exempt. Panhandle Oil Co. v. Knox, 277 U. S. 218 (1928). It has also been decided that a retired veterans' home is a federal instrumentality so that the Governor thereof cannot be held penally liable for violating a state statute regulating the use of oleomargarine. Ohio v. Thomas, 173 U. S. 276 (1899). If the assumption were correct that parity of reasoning prevails between state and federal instrumentalities, to-wit, that what is held an interference with a federal instrumentality if done by the state government, would be considered an interference with the state government if done by the federal government, and vice versa, (see Stone J. dissenting in Missouri v. Gehner, 281 U. S. 313, 328 (1930)), then the Knoxville General Hospital should be considered a governmental instrumentality. The suggestion has, however, been advanced that such parity of reasoning does not prevail. State of Alabama v. U. S., 38 F. (2d) 897 (Ct. Cl. 1930). This contention is based on the fact that the federal government is a government of delegated and enumerated powers, whereas the state government is a government of reserved powers. From this it has been concluded that every activity of the federal government is necessarily governmental and that the distinction between "proprietary" and "governmental" is relevant only in the case of state operations. This theory proceeds on the assumption that the federal government's activities will be narrowly confined and strictly responsive to the powers conferred in the Constitution. As a matter of fact, it is quite conceivable that the federal government will engage in commercial activities hardly distinguishable from those the state has engaged in in the past. The theoretical viewpoint advanced by the Court of Claims may still,

however, have utility as a means of distinguishing the Panhandle Oil case, cited supra.

It is my conclusion that it would be distinctly unsafe to insist that the Knoxville Milk License provisions supersede the prior governmental contracts entered into in behalf of the Knoxville General Hospital and the Knoxville Home.

Francis M. Shea,  
Chief, Brief and Opinion Section,  
Legal Division.

No. 17

CONSTRUCTION OF PHRASE "NOT IN CONFLICT  
WITH EXISTING ACTS OF CONGRESS" IN SECTION 8(3)  
OF THE AGRICULTURAL ADJUSTMENT ACT

The phrase "not in conflict with existing acts of Congress" as used in Section 8(3) of the Agricultural Adjustment Act does not prohibit the inclusion, in licenses issued thereunder, of limitations upon marketing and prices, on the ground that such limitations constitute violations of the anti-trust laws.

Opinion Section Memorandum No. 31  
Dated December 5, 1933.





December 5, 1933.

MEMORANDUM TO MR. McHUGH

In reply to your inquiry of October 18, I submit my opinion on the following question:

QUESTION

Does the phrase "not in conflict with existing Acts of Congress" appearing in Section 8(3) of the Agricultural Adjustment Act involve such restrictions on the terms which may be included in licenses that those provisions in licenses which impose limitations upon marketing and fix prices are invalid because they violate the Anti-Trust Laws?

OPINION.

It is my opinion that licenses are not so restricted in the terms by reference to the phrase in question for the following reasons:

First: It appears that the several anti-trust laws do not apply to acts of sovereignty.

Second: Though the anti-trust laws be applicable to the acts of sovereignty, under the "rule of reason" which is used in interpreting these laws, the license provisions in question would not violate them.

Third: The fact that Congress intended as one of the uses of licenses under Section 8 (3) the implementing of agreements under Section 8 (2), which agreements are expressly freed from the operations of anti-trust laws, makes it clear that licenses were not intended to be restricted in their terms by these laws.

I

Section 1 of the Sherman Act reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court". (July 2, 1890, c. 647, sec. 1, 26 Stat. 209, 15 U.S. Code 1.)

Section 2 of the Act reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, sec. 2, 26 Stat. 209, 15 U.S. Code 2.)

These two sections, which are complementary (see Standard Oil Company v. United States, 221 U.S. 1, 30 (1911)), apply to combinations or contracts entered into by any "person"; a term which is defined in Section 7, Title 15 U.S. Code, as follows: "The word 'person' or 'persons', wherever used in Sections 1, 2, 3 or 15 of this chapter shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (July 2, 1890, c. 647, sec. 8, 26 Stat. 210)". The same definition of "persons" is found in Section 12, Title 5, U.S. Code, where the term is defined for the purposes of the Clayton Act.

The phrase "corporations and associations existing under or authorized by the laws of either the United States... the laws of any state..." does not include commissions and agencies set up by the sovereignty to carry out a statutory regulation. Lowenstein v. Evans, 69 Fed. 908 (1895). In that case, where the state of South Carolina had passed a law creating a liquor monopoly to be owned by the State and an action had been brought against it under the Sherman Act, the court stated at page 911:

"Now, the question to be decided was not as to the constitutionality of the action,...but whether, in declaring and asserting this monopoly in herself, the state comes within the provisions of the Act of Congress of 1890...the section of the Act of 1890, sued upon, gives a right of action for any injury by any other person or corporation. The state is not a corporation. A corporation is a creature of the sovereign power deriving its rights from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by definite right...nor can it be said that the state is a person in the sense of this Act."

Not only does one find that the Anti-trust Laws have been specifically held not to apply to a state but when the United States Supreme Court undertook to consider a state pilotage monopoly created in interstate commerce, the court could find no added argument against the validity of such Act in the Anti-trust Laws. It in effect treated these laws as a nullity where applied to the sovereign action of a state. Olsen v. Smith, 195 U.S. 332, 344, 25 Sup. Ct. 52. (1904).

The following quotation is taken from page 345 of the case,

"The contention that by the clause the commission pilots have a monopoly of the business, and by combinations among themselves exclude all others from rendering piloting services, is also a denial of the authority of the state to regulate. Since if the state has the power to regulate, and in so doing can appoint and commission those who are to perform piloting services, it must follow that no monopoly or combination in a legal sense, can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law."



In Kansas City, Southern Railway Company v. Lusk, 234 Fed. 704, C.C.A. 8th (1915), the court held in receivership a railroad system which, it was contended, constituted a monopoly in violation of the anti-trust laws. The court, through its receiver, was operating this monopolistic system. In reply to the contention that this violated the federal and state anti-trust laws, the court stated on page 706,

"Moreover, the District Court took possession of the Frisco System through its receivers for a specific purpose. The whole system belonged to the Frisco. The court violated no anti-trust law of the United States or Missouri in taking possession of or in operating the Frisco System, as a reference to these laws will clearly show."

It is thus apparent that acts of sovereignty are not treated as in violation of the federal anti-trust laws.

## II

The combinations to which Section 1 of the Sherman Anti-trust Law quoted above apply have been limited by what is known as the "rule of reason". Since the Standard Oil Company case in 1910, this rule has been frequently repeated by the courts. It was specifically called upon in the recent case of Appalachian Coals, Inc., v. United States, 288 U.S. 344 (1933), where 73% of the coal producers in the Appalachian region had formed a single selling agency. This had been done to avoid the evil effects of competition which had ruined the industry. The court upheld this combination in view of the commercial disorganization of the coal industry. It discovered that this combination carried with it no monopolistic menace and, therefore, it was not against the public policy which is used in interpreting the Anti-trust Laws.

Similarly, the licensing provision of section 8 (3) of the Agricultural Adjustment Act carries with it no monopolistic menace. By monopolistic menace is meant the unification of control in the hands of a few. The court explained the point of view as follows:

"A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the

acquisition of full information of all relevant facts may properly be sought by cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. Maple Flooring Association v. United States, *supra*; Cement Manufacturers Association v. United States, 268 U.S. 588, 604. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices.

"Decisions cited in support of a contrary view were addressed to very different circumstances from those presented here. They dealt with combinations which on the particular facts were found to impose unreasonable restraints through the suppression of competition, and in actual operation had that effect. American Column & Lumber Co. v. United States, 257 U.S. 377; United States v. American Linseed Oil Co., 262 U.S. 371. Compare Maple Flooring Association v. United States, *supra*, at pp. 579-582. In Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, the combination was effected by those who were in a position to deprive, and who sought to deprive, the public in a large territory of the advantages of fair competition, and was for the actual purpose, and had the result, of enhancing prices,-- which in fact had been unreasonably increased."

It is evident that the Court does not object to an increase in prices, if there is no danger that the public will be over-charged, for the question the court is interested in is "not simply whether the parties have restrained competition between themselves, but as to the nature and effect of that restraint". (*Id.*, at 377) The Supreme Court had taken this position in Nash v. United States, 229 U.S. 373 (1913) where Mr. Justice Holmes, referring to the two cases of Standard Oil Co. v. United States, 221 U.S. 1 (1910) and United States v. American Tobacco Co., 221 U.S. 106 (1911), said: "Those cases may be taken to have established that only such contracts and combinations are within the act, which by reason of intent or inherent nature to the contemplated acts, prejudices the public interests by unduly restricting competition or unduly obstructing the course of trade". (*Id.*, at 376.)

Since it is the public interest which looms large when the court investigates violations of the Anti-trust Laws, the fact that the Agricultural Adjustment Act by Section 2 (2) undertakes to protect the consumer's interest and prevent unreasonably high prices, should free those terms in the licenses issued under the Act which fix prices from the stigma of illegality. Looking to the Appalachian Coal case, *supra*, one finds that the court has decided that the public is not prejudiced by a scheme of marketing control which is entered into to prevent destructive competition, though prices be raised. The parallel between this scheme and that which is proposed to be carried out by licenses is striking; both are devices by which destructive competition in an industry is to



be remedied and in both the public is protected against unreasonably high prices.

Another method of reaching the same conclusion as to the validity of these license provisions is to investigate another form of the "rule of reason". When the "rule of reason" first appeared in the Standard Oil case, supra, and the American Tobacco case, supra, the court decided that the words of Section 1 of the Sherman Act could not be read literally because any contract in effect restrains trade. It, therefore, proposed to use Section 2 of the Sherman Act as a means of interpreting Section 1 and decided that a combination in restraint of trade must be a combination which does or attempts to monopolize. Its own words will be found on pages 60 and 61 of the Standard Oil case. The following is a quotation therefrom: "in other words, having by the first section forbidden all means of monopolization of trade, that is, unduly restricting it by means of any contract, combination, etc.; the second section seeks, if possible, to make the prohibition of the Act all the more complete and perfect by repressing all attempts to reach the end prohibited by the first section, that is restraints of trade, by any attempt to monopolize, or monopolize control".

The court proposed to follow the method of interpretation it had set out by requiring that there be an intent to monopolize. In United States v. St. Louis Terminal Co., 224 U.S. 383 (1912), there was presented to the court the following situation: the Terminal Company controlled all the facilities by which a railroad might enter the heart of St. Louis, yet not every railroad was permitted to become a member of that company. The court found that the mere unification and control was not to be condemned but the fact that the Terminal Company excluded some railroads from its membership showed an intent to monopolize which was illegal. Its decree permitted the company to retain its complete control if it would permit all railroads to become members on equal terms. On page 394 of the opinion it expresses its position as follows: "it is not contended that the unification of the Terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions a combination in restraint of trade or commerce. Whether it is a facility in aid of interested commerce or an unreasonable restraint forbidden by the Act of Congress...will depend upon the intent to be inferred". In licensing under the terms of the Agricultural Adjustment Act there is no intent to create a monopoly. In fact there is an attempt to protect weaker companies from destructive competition, so that ultimately more companies will be in the field. In Nash v. United States, supra, the practice of driving out competitors by under-selling was found condemned by the Anti-trust laws. Lacking an intent to monopolize the licensing provisions should be valid. The mere fact that the prices are uniform has been found not be evidence of an intent to monopolize. United States v. U.S. Steel Corp., 251 U.S. 417 (1920), and United States v. International Harvester Co., 274 U.S. 693 (1927).

Thus, it will be seen that it is not sufficient to constitute a violation, unless the combination unduly restricts competition and obstructs the course of trade. It cannot be said that such an Act as the Agricultural Adjustment Act whose purpose as stated in the declaration of emergency, is to eliminate the competition which arises from a

disorderly exchange of commodities and low prices, the effects of which are to obstruct the normal currents of commerce in such commodities, would violate the anti-trust laws nor that any license which had as its purpose the return of orderly competition and not the creation of a monopoly, would be either an undue restriction of competition or an obstruction of the course of trade.

Where the government in an effort to carry on the Great War and to achieve an orderly distribution of food products required that a clause which on its face violated the anti-trust laws, be placed in a contract, it was held that such clause was no longer a violation of these laws. Fosburgh v. California and Hawaiian Sugar Refining Co., 291 Fed. 29 (C.C.A. 9th, 1923).

### III

Interpreting Section 8 (3) in the light of the fact that Section 8 (2) frees marketing agreements from the restrictions of the anti-trust laws one is led to the conclusion that Congress did not intend licenses to be more closely restricted in operation. It appears in the House Report, Seventy-third Congress, first session, Report Number 6 (March 20, 1933), which was presented by the Committee on Agriculture in reporting HR 3835, the original form of the Agricultural Adjustment Act which contained the licensing section as it appears now, that one of the purposes of the licensing section was to aid the Secretary of Agriculture in effectuating marketing agreements (see page 4 in the Report). The means of supporting marketing agreements by licenses is to put those who have not yet entered into a marketing agreement in the same position as those who have. If it were otherwise and if those who had not entered into the agreement were given the competitive advantage of selling at whatever price they might choose and purchasing at such prices as they might desire, then the licensing provisions would be wholly ineffective as a means of upholding marketing agreements. It follows that licenses must contain terms and conditions as onerous as the marketing agreements and that Congress in referring to existing Acts never intended that these references should permit the anti-trust laws to interfere with making the terms and conditions of licenses effective for one of their major purposes.

Jerome N. Frank,  
General Counsel.

No. 18

GARNISHMENT OF BENEFIT PAYMENT CHECKS  
IN HANDS OF COUNTY AGENTS

Benefit payment checks, while in the hands of a county agent for delivery to the payee, may not be garnished or attached to satisfy the claims of creditors of the payee.





December 6, 1933

BENEFIT PAYMENT CHECKS IN HANDS OF FEDERAL AGENTS  
NOT SUBJECT TO GARNISHMENT

GENERAL PROPOSITION

Money in the hands of a federal officer, for disbursement in the course of the performance of his official duties, is not subject to garnishment.

This general proposition, which rests upon broad considerations of public policy and is akin to the doctrine of the immunity of federal instrumentalities and the doctrine that the sovereign may not be sued without its consent, admits of no dissent. The principle upon which it is founded extends beyond the agents of the federal government. Thus, it can be said that "this rule, as far as it is applicable to national and state officers, has never been seriously questioned, having been established at an early date in our national history and having been sustained ever since by the adjudications of both the national and state courts." 12 R.C.L. Garnishment, Section 81.

Where, by reason of special statute, creditors are permitted to reach funds in the hands of public officers, the statute is interpreted as a grant of a privilege and is strictly construed. Weiser v Payne (Cal.) 294 P. 407 (1930). And governmental agencies are held not to be embraced within the scope of such statutes unless included in unequivocal terms. Porter & Blair Hardware Co. v. Perdue, 105 Ala. 293, 16 So. 713 (1894). No federal statute authorizes the garnishment of officers of the United States, nor can such officers, in the course of the performance of their public duties be subjected to the burden of garnishment under state authority.

The classic authority on this general proposition is Buchanan v. Alexander, 4 How. 20 (1846), which involved the garnishment in the hands of a federal officer of wages due to employees of the United States. The reasons for the rule were set forth by the Supreme Court in the following language:

"If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction

it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service.

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury."

On the facts of the Buchanan case it constitutes direct authority only on the question of wages due to employees of the federal government, and it has been stated, in 10 Op. Atty. Gen. 120 (1861), that "no principle is better settled than that money in the hands of a disbursing officer of the United States due to an employee of the Government, cannot be attached by a creditor of that person in payment of the debt."

The broad principles laid down in the Buchanan opinion, however, have not been limited in their application to money held by government agents for the payment of salary to other government agents or servants. In 13 Op. Atty. Gen. 566 (1872) it was broadly stated, on the authority of Buchanan v. Alexander, that "money in the hands of a disbursing officer of the government is not subject to attachment by creditors of persons to whom such money is due." The question before the Attorney General involved funds in the hands of the postmaster of New York for the payment of a contractor for material furnished to the government. It was advised that he should proceed to make the payment, disregarding an attachment served upon him at the instance of a creditor of the contractor.

In two cases involving funds of Indian agents the Supreme Court of Oklahoma, ignoring special circumstances which might serve as special grounds, has rested its decision on the broad ground that agents of the United States are not subject to garnishment as to funds in their hands for the purpose of carrying out the performance of a governmental duty. Manwell v. Grimes (Okla.) 149 P. 1182 (1915); White v. Wright, (Okla.) 1 P (2) 668 (1931). In the Manwell case the funds in question were not received from the federal government but had been recovered upon the cancellation of deeds to land which had belonged to certain Indians. Small emphasis was placed on the fact that the moneys were to be paid to persons to whom the United States bears the relation of guardian but the official character of the agent holding the funds was stressed. Of a statute providing that Indian agents must account for all funds coming into their hands as custodians from any source whatever, the court said:

"Evidently this Act of Congress was passed for the direct purpose of covering and including just such cases as this, to prohibit agents and officers of the government from receiving money as trustees, and afterward claiming that they received it in a personal or individual capacity, and not as an officer or agent of the government, thereby raising

the question as to whether the funds were held in an official or personal capacity."

In the White case, which involved funds held by federal agents as trustee for the estate of an Indian to whom a certificate of competence had been issued, the court said (p. 669):

"In the last analysis we see nothing but what is in effect an effort to assert a claim against the United States, as the garnishment proceedings, while running against the officers individually, seek to hold the officers for what they hold officially, and to hold them liable would be to dictate how, when, and in what manner, the governmental duty of the United States should be performed. This cannot be done because the government cannot be subject to garnishment, nor can it be done indirectly by subjecting its servants to the process."

In Clark v. Board of Commissioners, (Okla.) 161 P. 790, 792 (1916), in which the garnishment of county officials was the issue, the same court stated that it had "held that on grounds of public policy, the government of the United States, and officers and agents thereof, are exempt from garnishment."

The universal acceptance of this proposition as it relates to federal officers is indicated in the language of opinions dealing with the extent to which funds in the hands of county and municipal officers are exempt from legal process. Thus in Dow v. Irwin, 21 N.M. 576; 157 P. 490 (1916), in which it was held that public policy forbids the garnishment of moneys due the creditors of a county, a question on which there is some conflict of authority, the court said (p. 492):

"Money in the hands of a disbursing officer of the national or state government cannot be reached by garnishment process or creditor's bill. This proposition is well settled and uniformly adhered to by all the courts." (Italics added).

## ARGUMENT

### I.

The garnishment of benefit payment checks in the hands of county agents impedes the performance of governmental functions and is contrary to public policy.

The benefit payment checks are received by the county agent, as an agent of the federal government, to be delivered to persons in fulfillment of contracts entered into under the authority of the Agricultural Adjustment Act. The county agent has no personal interest in the



checks thus received, and his responsibilities in connection with their custody and delivery are entirely of an official character. The garnishment of such checks while in his hands would, therefore, operate to obstruct him in their performance of his public duties.

That the administration of public business should not be hampered by the tying up of funds in the hands of governmental agents in the interest of private parties is contrary to public policy and has been so recognized by the cases. See Buchanan v. Alexander, 45 U. S. at 20. See also Weiser v. Payne, *supra*, at 407; Southwestern Surety Insurance Co. v. Wells, 217 Fed. 294, 296 (E. D. Pa. 1914); Bank of Tennessee v. Dibrell, 3 Sneed 379 (Tenn.); Hines v. Minor, (Ga.) 105 S. E. at 851 (1921); Porter & Blair Hardware Co. v. Perdue, 105 Ala. 293, 16 So. at 713 (1894).

While the threat to the interruption of government services is most apparent in the case of process against funds representing wages due to public employees, the inconvenience and harassment to which public officers may be subjected through writs of garnishment and like process are equally recognized by the courts as contrary to the public interest. Thus it was said, in Addystone Pipe and Steel Co. v. City of Chicago, 170 Ill. 580, 48 N.E. 967, 968 (1897):

"A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another."

The doctrine that federal agents must be unimpeded in the performance of their official duties is recognized as so fundamental to the public interest that the courts have held that a government official, acting in the proper exercise of his duties, is exempt, not only from civil processes but, under certain circumstances, even from criminal process. In re Neagle, 135 U.S. 1 (1890); Ohio v. Thomas, 173 U.S. 276 (1899); Johnson v. Maryland, 254 U. S. 51 (1920) in which it was said (p. 56) that

"even the most unquestionable and uniform application of state laws such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States."

Cf. U. S. v. Kirby, 74 U.S. (7 Wall.) 482 (1868), in which a sheriff who arrested a mail carrier for murder was held not guilty of violating the penal statute against obstructing the mails, but in which it was said (p. 486): "All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged."

Similarly the reasoning in the cases regarding the immunity of federal instrumentalities from taxation stresses the importance of protecting the operations of the government from burden and impediment.



Thus, in McCulloch v. Maryland, 4 Wheat. 316, 436 (1819), it is pointed out that the principle is aimed at the protection of the operations of government and the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions." This fundamental purpose is noted in Fox Film Corp. v. Doyal, 286 U.S. 123, 128 (1932), in distinguishing, for purposes of taxation, property rights created by the United States which have passed into private hands and are exercised for private advantage from those in which the United States has a beneficial interest.

## II.

A garnishment of funds in the hands of a public officer in his official capacity is in the nature of a suit against the state, which, as sovereign, cannot be sued without its consent.

It is well established that a suit against a public officer acting in his public capacity is a suit against the state, even though the state is not named, and that the state, being sovereign, may not be sued without its consent.

While garnishment is generally viewed as a supplemental action, it nevertheless is in the nature of a suit against the garnishee brought "by the defendant in the name of the plaintiff". Hines v. Minor, (Ga.) 105 S.E. 851 (1921). As stated in Tucker v. Pollock, 21 R.I. 317, 43 Atl. 368, 370 (1899):

"It would be a strange anomaly of the law if a creditor of the defendant could by indirection maintain an action against the State when he himself could not do so directly."

In Zink v. Black Star Line, Inc., 18 F. (2) 156 (1927), a suit was brought in the District of Columbia on a New York judgment, and a writ of attachment or garnishment was asked against the United States Shipping Board on account of certain monies or credits due the defendant. The court refused the garnishment on the ground that the claim was one against the United States which could not be sued without its consent.

This rule of the immunity of the state from suit, direct or indirect, is only another expression of the principle that the administration of public affairs cannot be suffered to be impeded by interests of a purely private nature and rests upon the same considerations of public safety and convenience.

## III.

A benefit payment check in the hands of a county agent and before delivery to the payee is property of the United States and therefore immune from process.

Looking to the check itself as an instrument, the contract on the instrument is incomplete and revocable until delivered to the payee. See cases collected in Brannan's Negotiable Instruments Law (5th Ed.) 216-218. Moreover, so long as it remains in the possession of the county agent, it is the property of the United States, subject to its dominion and control. It has long been recognized that the same exemption from judicial process which extends to the United States and its agents applies also to its property. The Siren, 74 U. S. 1152 (1868). Any restriction imposed to limit the physical disposition of the check, therefore, burdens the government in the use and disposition of its property and thus in the exercise of its sovereign authority.

Again the principle is the same as that on which the property of the United States and federal instrumentalities are exempt from state taxations. (Van Brocklin v. Tennessee, 117 U. S. 151) and which, in the case of a property right created by statute to fulfill a governmental purpose, looks to the point at which the beneficial interest of the government ceases and the property right is exercised for private advantage as the point where the exemption ceases. Fox Film Corp. v. Doyal, 286 U.S. 123. The same principle, coupled with that of protecting administrative officers in the unimpeded performance of their public duties, underlies the holding that federal agents may not, contrary to the instructions of their superior officers, be compelled, under subpoena, or otherwise, to produce records which are the property of the United States. Boske v. Comingore, 177 U. S. 459 (1900).

#### IV.

The purpose of the Agricultural Adjustment Act would be defeated by permitting the diversion of benefit payments from the producer to his creditors.

The whole tenor and the wording of the Act indicate that its primary purpose was to dissipate the present acute economic emergency and restore the normal current of interstate commerce by increasing the purchasing power of the farmer. Because

" \* \* \* the present acute economic emergency is in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers. \* \* \* "

the Act clearly enunciates a policy of "reestablishing prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of Agricultural commodities in the base period." The Act sets forth that it is the policy of Congress "to approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current

consumptive demand in domestic and foreign markets."

In order to effectuate this policy, the Secretary is empowered, by Section 8(1), to provide for "benefit payments". It is apparent that the unhindered transmission of the benefit payments to the producer is vital to the achievement of the purposes of the Act and that any diversion of such payments to creditors tends to destroy the efficacy of the program for increasing the purchasing power of producers.

The principle involved is similar to that in cases relating to pensions, state as well as federal, which hold that pension funds are exempt from attachment while in the course of transmission to the pensioner. As to federal pensions, war risk insurance payments, and adjusted compensation benefits, Congress has provided specifically for their exemption from attachment and garnishment, 38 U.S.C.A. Sects. 54, 453, 618. These express provisions cannot be regarded as indicating that, in the absence of a specific statutory provision, such moneys would be subject to garnishment in the hands of federal officials before delivery but rather as broadening the normal scope of such exemption, protecting the payments in the course of transmission to the pensioner, or up to the time of expenditure in his behalf, even though not in the hands of a government officer or agent. Wilson v. Sawyer, 177 Ark. 492, 6 S. W. (2) 825 (1928); Manning v. Spry, 121 Iowa 191, 96 N.W. 873 (1903). It has even been held, in the case of war risk insurance payments, for instance, that property purchased with the proceeds is not subject to execution. Payne v. Jordan, 152 Ga. 367, 110 S.E. 4; Payne v. Jordan, 36 Ga. App. 787, 138 S.E. 262 (1927); Crow v. Brown, 81 Iowa 344, 46 N.W. 993 (1890). Similar results are obtained, irrespective of express statutory provision for exemption, where the pension statute is interpreted in the light of a purpose to benefit the soldier directly and to protect him in his ability to purchase the necessities of life. Yates County National Bank v. Carpenter, 119 N. Y. 550, 23 N.E. 1108 (1890); City of Atlanta v. Stokes, (Ga.) 165 S.E. 270 (1932).

The Agricultural Adjustment Act, being designed to benefit a particular class, in respect to restoring their relative purchasing power, must be construed in relation to its purpose. Aside from the well established rule that federal officers are exempt from garnishment as to moneys to be applied for governmental purposes, it is clear that garnishment, being a remedy of statutory creation only, cannot be applied in disregard of a legislative policy, appropriatively expressed, to place within the hands of a designated class benefit payments of the kind here in question.

Francis M. Shea  
Chief, Brief and Opinion Section  
Legal Division





No. 19.

FINDINGS UNDER SECTION 15(d)  
OF THE AGRICULTURAL ADJUSTMENT ACT

In proclaiming his findings, under Section 15(d) of the Agricultural Adjustment Act, preliminary to the levy of a compensating rate of tax upon competing commodities, the Secretary is not prohibited from relying on information extraneous to the record of the required hearing.

Opinion Section Memorandum No. 29  
Dated December 12, 1933.



December 12, 1933.

MEMORANDUM FOR MR. FRANK

Dear Mr. Frank:

Pursuant to your request, I respectfully report my opinion on the following question:

QUESTION

The question under discussion is whether under Section 15 (d) of the Agricultural Adjustment Act the Secretary of Agriculture may proclaim his findings concerning the necessity for a compensating rate of tax on the processing of commodities competing with the basic agricultural commodities on the basis of information not in the Record. The section of the Act provides:

"If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition."

The problem is whether "investigation and due notice and opportunity for hearing to interested parties" necessitates that the interested parties be confronted with materials made part of the record. This whole question acquires significance because of the fact that parties whose information will be useful in connection with this proceeding will be reluctant to impart information when not assured that such information will be kept confidential.

OPINION

There is nothing in the present state of authorities which prohibits the Secretary of Agriculture from relying on information extraneous to the record; and the last pronouncement of the Supreme Court in an analogous situation is quite persuasive to the effect that he can so rely. Other administrative considerations allowing him to rely on such outside information will be presented subsequently.

SUMMARY OF DISCUSSION

I. Contrary precedents may be distinguished.

(a) They deal mainly with controversies characteristically denominated quasi-judicial.

(1) Most of them deal with rate making.

(2) The dictum in Crowell v. Benson is distinguishable.

- (b) The Stockyards and Packers Act in terms conforms the Secretary of Agriculture's procedure to that of the Interstate Commerce Commission.
  - (c) Cases wherein the rule of complete reliance on the record was insisted upon against the objector to the determination of the Commission must be distinguished from cases where the tribunal supports its own position by facts dehors the record.
- II. Taxation as an administrative rather than a quasi-judicial function is characterized by a minimum of procedural safeguards.
  - III. The Secretary is here performing not only an administrative function but one peculiarly related to public emergency.
  - IV. The procedure under Section 15 (d) may be compared to the procedure undergone in fixing tariffs, wherein the Supreme Court at present permits reliance on fact not in the record.
  - V. Administrative procedure characterized by laxer rules of evidence permits reliance on matters outside of the record.
  - VI. The judicial distrust of administrative action under which the rule of exclusive reliance on the record originated is not justified.

#### DISCUSSION

- I. Contrary precedents may be distinguished.
  - (a) They deal mainly with controversies characteristically denominated quasi-judicial.
    - (1) Most of them deal with rate making.

The rule that all the information upon which an administrative body is to reply must be contained in the record had its inception in a case dealing with the Interstate Commerce Commission:

"All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." Inter-State Commerce Commission v. Louisville & Nashville R.R. Co. 227 U. S. 88, 92 (1913).

This last case is the only authority relied upon in the Chicago Junction case 264 U. S. 268 (1924), where, at page 263 it is said that facts conceivably known to the Commissioner but not put into evidence will not support an order of the Commission.



The case which is most strongly depended upon for this position, U. S. v. Abilene & Southern Railway Co., 265 U. S. 274, is also a rate fixing case dealing with procedure before the Interstate Commerce Commission. It is therein stated that findings based in part on annual reports filed with the Commission and not formally put into evidence cannot be upheld, altho the case may in a large measure be treated as simply providing a canon of Construction for Rule of Practice number 13 of the Interstate Commerce Commission.

Tagg Bros. & Moorehead v. U. S., 280, U. S. 420 (1930) is also a case dealing with the reasonableness of rates charged, this time by stockyard men, and it enunciates the same rule.

The final work of the Federal courts on the subject is the case of Denver Union Stockyard Company v. U. S., 57 Fed. (2nd) 735, 752 District Colo. (1932), where the rule that the administrative authority must depend absolutely on the record before him is explicitly limited to rate-making bodies:

"The rule is settled that rate-making bodies may not predicate their findings upon matters not offered in evidence. U. S. v. Abilene, 265 U. S. 274, 44 S. C. 565, 68 L. Ed. 1016." (at 752).

Rate fixing is the prototype of the kind of activity which the courts have consistently called quasi-judicial, and on which they have endeavored to put numerous restraints. The work of the Interstate Commerce Commission was one of the first grand administrative ventures of the Government in a sphere that had always been thought of as non-governmental and the jealousy with which the courts have looked upon the activities of public utility commissions is still largely the result of the inertia of the judiciary in changing its ingrained attitude in this connection. The questions presented for review to the courts in this field have involved, in addition to the usual administrative bones of contention of jurisdiction and arbitrary action, constitutional issues of deprivation of property without due process which have not been raised as insistently in other fields of administrative action. A citation from Mr. Justice Cardozo's opinion in Norwegian Nitrogen Products Co. v. U. S. 283, U. S. 294, 317 (1933) voices this distinction. The distinction is made with reference to a body which shall, somewhat later in this opinion, be shown to be more analogous to the Secretary of Agriculture acting under Section 15 (d) than are the Interstate Commerce Commission or cognate bodies.

"Much is made by the petitioner of the procedure of the Interstate Commerce Commission when regulating the conduct of the charges of interstate carriers, and that of the Public Service Commissions of the states when regulating the conduct or the charges of public service corporations. The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial. Prentis v. Atlantic Coast Line

Co., 211 U. S. 210, 226; Keller v. Potomac Electric Power Co., 261 U. S. 428, 440, Cf. People ex rel. C. P. R. Co. v. Wilcox, 194 N. Y. 383, 386; 87 N.E. 517. Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditional forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. Smyth v. Ames, 169 U. S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts. Interstate Commerce Comm'n v. Union Pac. R. Co., 222 U. S. 541, 547; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481; Northern Pac. Ry. Co. v. Dep't Public Works, 268 U. S. 39, 44; Chicago, M. & St. P. Ry. Co. v. Public Utilities Comm'n, 274 U. S. 344, 351. Cf. Sharfman, The Interstate Commerce Commission, vol. II, p. 624. The 'hearing' that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. Interstate Commerce Comm'n v. Louisville & N.R. Co., 227 U. S. 88, 93; St. Louis-S. W. Ry. Co. v. Interstate Commerce Comm'n, 264 U. S. 64; Atchison, T & S. F. R. Co. v. United States, 284 U. S. 248. The Commerce Act, as it stands today, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a Commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision. No such inference is to be drawn from the act before us now."

(2) The dictum in Crowell v. Benson is distinguishable.

Crowell v. Benson is one case not dealing with rate regulation where the rule of complete reliance on the record is stated:

"Facts conceivably known to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order." Interstate Commerce Commission v. Louisville & Nashville R. Co. 227 U. S. 82, 93; The Chicago Junction Case, 264 U. S. 259, 263; United States v. Abilene & Southern Ry. Co., 265, U. S. 274, 283.

The case is a case dealing with the finality of determinations of workmen's compensation tribunals, which is a decision necessarily of the quasi-judicial type. It will also be noted that the three cases cited in support of the proposition above quoted are all cases dealing with rate determinations of the Interstate Commerce Commission, which have been dealt with in the section immediately preceding. Further evidence of the connection of this case with the cases enumerated in the prior section is to be found in the dissenting opinion of Mr. Justice Brandeis at page 75, where a reference to Tagg Bros. & Moorehead v. U. S., cited supra, in which the action of the Secretary under Section 316 of the Packers and Stockyards Act is analogized to an order of the Interstate Commerce Commission, is followed by an express recognition of the fact that the decisions of these Federal Administrative tribunals are quasi-judicial.

On page 93 Mr. Justice Brandeis definitely states:

"Such a doctrine has never been applied to tribunals properly analogous to the deputy commissioners, such as the Interstate Commerce Commission, the Federal Trade Commission, the Secretary of Agriculture acting under the Packers and Stockyards Act, and the like."

In this matter of comparative similarity of administrative functioning one can rely on Mr. Justice Brandeis' erudition, although it should not be over-difficult to adduce supporting arguments. The genesis and whole context of the Crowell Case once again illustrates the usual judicial antagonism towards new administrative (or as it is often termed bureaucratic) developments. It must be emphasized once more, in distinguishing the Crowell Case, that this distrust is felt all the more when there occurs an assumption of power by an administrative tribunal in a sphere that the courts have always considered judicial, such as workmen's compensation.

- (b) The Stockyards and Packers Act in terms conforms the Secretary of Agriculture's procedure to that of the Interstate Commerce Commission.

7 U. S. C. A., Section 217, explicitly provides that:

"The provision of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or setting aside in whole or in part the orders



of the Interstate Commerce Commission are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of Sections 201-217 exclusive of this chapter...."

"The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him -- save there may be an exception of issues presenting claims of constitutional right."

Tagg Bros. & Moorehead v. U. S. 230 U. S. 420, Act 443.

The Denver v. Union Stockyards case above referred to is grounded on the identical statutory provision.

- (c) Cases wherein the rule of complete reliance on the record was insisted upon against the objector to the determination of the Commission must be distinguished from cases where the tribunal supports its own position by facts dehors the record.

Attempts to overthrow an administrative finding on the basis of newly discovered evidence or evidence not introduced at the Commission hearing are much more frequent than the Commission's attempt to ground its decision upon the basis of facts not originally introduced into evidence. The rule applicable to an appellant from the Commission, in its verbal statement, may often be indistinguishable from the verbal statement of the rule applicable where the administrative body seeks to rely on new evidence, but the fact situation is quite different. The unwieldy machinery of modern government justifies the demand that a party litigating in only one case should exercise the initiative in presenting his full case at the earliest possible moment, rather than that an administrative tribunal confronted by a multitude of cases should take cognizance of all facts in the individual situation with equal rapidity. See as an illustration of this, Louisville & Nashville Ry. Co. v. U. S., 245 U. S. 263, 266 (1918).

Another illustration of a case where an appellant from an administrative determination is attempting to interpolate new evidence is to be found in the case of Tagg Bros. & Moorehead v. U. S. *supra*.

"On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate-making body. Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings."



Once more it is evident that what is involved in this class of cases is the respective spheres of administrative and judicial action, and not the measure of protection that is to be accorded parties litigant.

II. Taxation as an administrative rather than a quasi-judicial function is characterized by a minimum of procedural safeguards.

The past history of taxation procedure indicates that it has been quite summary in method. The theory appears to be that the day-to-day business of the government cannot wait for an elaborate judicial procedure to work itself out in all of its details. Only property rights are involved and summary proceedings may therefore be encouraged as long as there remains an opportunity for eventual judicial review. Taxing has occupied this peculiar position since the days of Murray's Lessee v. Hoboken Land & Improvement Co. 18 How. 272.

A lengthy quotation from the opinion of Mr. Justice Brandeis in the case of Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 595, may be justified on the grounds of his historical completeness.

"The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. There, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare Cheatham v. United States 92 U. S. 85, 88-89; Springer v. United States, 102 U. S. 586, 594; Hagar v. Reclamation District No. 108, 111. U.S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, United States v. Woo Jan, 245 U. S. 552; Ng Fung Ho v. White, 259 U. S. 276, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue. Snyder v. Marks, 109 U. S. 189; Dodge v. Osborn, 240 U. S. 118; Graham v. du Pont, 262 U. S. 234. This prohibition of injunctive relief is applicable in the case of summary proceedings against a transferee. Act of May 29, 1928. c. 852. Sec. 604, 45 Stat. 791, 873. Proceedings more summary in character than that provided in Sec. 280, and involving less directly the obligation of the taxpayer, were sustained in Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272. It is urged that the decision in the Murray case was based upon the peculiar relationship of a collector of revenue to his government. The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.

Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. Springer v. United States, 102 U. S. 586, 593; Scottish Union & National Ins. Co. v. Bowland, 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing. Compare North American Cold Storage Co. v. Chicago, 211 U. S. 306; Hutchinson v. Valdosta, 227 U. S. 303; Adams v. Milwaukee, 228 U. S. 572, 584. Because of the public necessity, the property of citizens may be summarily seized in wartime. Central Union Trust Co. v. Garven, 254 U. S. 554, 566; Stoehr v. Wallace, 255 U. S. 239, 245; United States v. Pfitsch, 256 U. S. 547, 553. Compare Miller v. United States, 11 Wall. 268, 296; International Paper Co. v. United States, 282 U. S. 399; Russian Volunteer Fleet v. United States, 282 U. S. 481. And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. Compare Kohl v. United States, 91 U. S. 367, 375; United States v. Jones, 109 U. S. 513, 518; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 306."

- III. The Secretary is here performing not only an administrative function but one peculiarly related to public emergency.

The latter part of the preceding citation indicates that the emergency nature of the Agricultural Adjustment Act may be ample ground for not placing impediments in the way of administrative officers entrusted with its enforcement. Critical economic conditions may well be compared with wartime conditions as justifying summary action by the administrative acting under orders from the executive. The declaration of emergency is to be found in the inception of the Agricultural Adjustment Act.

- IV. The procedure under Section 15 (d) may be compared to the procedure undergone in fixing tariffs, wherein the Supreme Court at present permits reliance on facts not in the record.

It will be noted that under Section 15 (d):

"The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this



proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition."

It will be immediately apparent that this is roughly equivalent to the procedure followed in fixing tariffs, where the object is to ascertain to what extent foreign competition has placed domestic production at a disadvantage. That the problem under the Agricultural Adjustment Act is an internal one instead of one involving foreign relations does not affect the techniques employed. It should be borne in mind that the American product in the case of a tariff is protected not only from the identical foreign product, but from any substitutes manufactured abroad which might seriously disturb the competitive position of the American product in the American consumption market.

The point of this analogy is that the fixing of tariffs is uniformly recognized as a procedure administrative in nature and subject to a minimum of judicial checks. Accordingly, it is a great support to the thesis of this memorandum that in the Norwegian Nitrogen Case, see *supra*, the last word from the Supreme Court on the general problem here under discussion, the court, with only one dissent, decided that the agent of a foreign producer was not entitled to disclosure of information and statistics relating to the cost accounting systems of domestic producers in the same field, where such statistics grounded the action of the Tariff Commission in setting up its tariff rate. In addition to the similarities of the procedure that the economists of the Tariff Commission and the economists aiding the Secretary of Agriculture under Section 15 (d) will have to undergo, the necessity for the administrative body's suppressing findings from the record is the same in either case. Both Tariff Commission and Secretary of Agriculture desire to have parties testify freely and without compulsion at their hearings, and realize that it will be impossible to attain this unless the information disclosed is treated as confidential. Considerations of decency and fair play to the informant are also involved.

"There is indeed a possibility that the work of such a body would be seriously hampered if producers were not made to feel that information which in the thought of many is ranked as confidential would be withheld from prying eyes. Particularly might that be so when inquiry would have to be made of manufacturers abroad, not subject to compulsion. Business men may exaggerate the importance of secrecy in matters of this kind. Their sensitiveness is to be reckoned with, whether it be reasonable or not." Norwegian Nitrogen Co. v. United States. 288. U. S. - 294 - 322.

Furthermore, the procedure before the Tariff Commission distinctly diverges from the routine before the Interstate Commerce Commission and approaches that envisioned under the Agricultural Adjustment Act, in that the proceedings are not adversary, but are advisory in nature. This is an exceedingly important distinction because it means that the proceedings are focused on the problem of determining governmental action rather than the adjudicating between two adverse parties. The following definition taken from an Interstate Commerce Commission case may render this distinction somewhat clearer:

"Every proceeding is adversary in substance, if it may result in an order in favor of one carrier as against another. Nor is proceeding under review any the less an adversary one because the principle purpose of the Commission was to protect the public interest through making possible the continued operation of the Oriental system. The fact that it was on the Commission's own motion that use was made of the data, in the annual report is not of legal significance." U. S. v. Abilene Railway Co., 265 U. S. 274 at 289.

This is not an order in favor of one party as against another. It is a direct exercise of the federal government's taxing power.

One should not, however, be too sanguine about the effect of this case. For one thing the Tariff Commission is concerned with foreign commerce, which the courts have generally left untouched to an unprecedented degree. The proceeding under Section 15 (d) relates to interstate commerce where the judiciary has very often felt itself warranted in interfering.

Another factor to be considered in discounting the effect of this case is the fact that the court undoubtedly was irritated by the fact that the foreign importer, who wanted to acquire this information about the costs of production of the American producer, was himself unwilling to supply his own costs of production.

"The unwillingness of the petitioner to submit the costs of its Norwegian principal, or to make any effort to submit them, has closed its mouth to the complaint that the refusal to disclose the costs of its American competitor has nullified the report and the proclamation based upon it.

"The Norwegian principal, as we have seen, declined to give any information to the agents of the Commission and left them to make up their estimate of the foreign costs from indirect and imperfect sources. The petitioner, to be sure, was an agent, not a principal, yet it was the exclusive agent in the United States, and plainly in a relation that gave it influence, if not authority. Not once during the hearing did it offer to make an effort to obtain the foreign costs and submit them to the Commission under a pledge of confidence or otherwise. Its attitude was one of indifference so complete as to vary hardly at all, or so at least the Commission might reasonably infer, from one of purposeful obstruction.

"This attitude of obstruction is not to be ignored in determining whether the information to be imparted to the petitioner was curtailed by the Commission in any arbitrary way. One who seeks equity must do it.

"The question in that aspect becomes this: Does justice require that the costs of a domestic producer shall be



made known to an importer who is unwilling to use reasonable effort to make disclosure of the costs of his principal abroad? A mind neither perverse nor arbitrary in its judgments might think the answer should be 'no'." Norwegian Nitrogen Co. v. U. S., 288 U. S. 322, 323, 324.

The third weakening factor in this case is the fact that the wording of the statute describing the Tariff Commission's procedure is much more liberal than the language prescribing the forms that the Secretary of Agriculture is to follow in assessing the compensating tax. The statute under which the Secretary of Agriculture acts has been set forth in the general statement of the question herein involved. For comparison purposes there is supplied the relevant sections of the Tariff Act of 1922, under which the Nitrogen Case arose.

"The President, insofar as he finds it practicable, shall take into consideration (1) the differences in conditions in production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition..... The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard."

Inspection of these two provisions reveals that whereas the Agricultural Adjustment Act prescribes "due notice and opportunity for hearing to interested parties", the Tariff Act merely stipulates "reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." Mr. Justice Cardozo, on the basis of an elaborate investigation into the prior history of the Tariff Commission and the legislative history of the Tariff Act of 1922 makes the Tariff Commission the final arbiter of what is "reasonable". That the Secretary of Agriculture may be allowed to decide what is "due" is arguable, but is presently undecided.

The whole question of the nature of the Secretary of Agriculture's functions in connection with the compensating tax is one which may be gone into in further detail, but this is suggested as an initial aperçu. The citations and the trend of reasoning in the dissenting opinion of Mr. Justice Brandeis in Crowell v. Benson in pages 83 et seq might furnish a starting point for such investigation. See also Freund "Administrative Powers Over Persons and Property"; Dickinson "Administrative Justice and the Supremacy of Law."

V. Administrative procedure characterized by laxer rules of evidence which permits reliance on matters outside of the record.

Administrative tribunals such as the Interstate Commerce Commission or the representatives of the Secretary of Agriculture are generally

composed of experts in their fields who may well be acquainted with a far wider range of information than the parties who invite the litigation. It does not appear like a sensible procedure to compel them to refrain from any use of this information on the technical ground that they had not got it into the record at the appropriate time. Not only does this demand appear senseless, in a very literal sense it appears impossible:

"The Commission was not required to shut its eyes to what it saw in that proceeding or close its mind to the knowledge it there acquired, and proceed afresh in the instant application for a short extension from the long one without regard to what it knew -- and could not forget -- had a bearing one upon the other."

Pa. R. R. Co. v. U. S. 40 Fed.(2nd) 921, 924.

This line of analysis finds further support in an expansion of the doctrine of judicial notice, for intimations are present even within the limits of the small number of cases that are cited in this memorandum that this doctrine has a distinct place in the theory of judicial review of administrative action. Thus the court in one of the cases above cited, Denver Union Stockyard Co. v. U.S.D. Col. 1932, page 753, has taken judicial notice of the depression. Furthermore, one of the objections to outside findings which were put forth in the Abilene case, cited above, was the fact that annual reports filed with the Commission and not formally put into evidence concern such facts as the court could have no judicial notice about. The evidentiary basis of the doctrine of judicial notice is that courts are only to take notice of those facts of which they may be expected to take notice and so even if they happen to be aware of other facts they may not judicially notice such facts unless they would fall within the ordinary range of knowledge of the Judge. Inasmuch as administrative tribunals are composed of experts, the ordinary range of a commissioner's knowledge would be much wider than the ordinary range of a judge's knowledge and therefore a much wider scope would be allowable for the doctrine of judicial notice in the case of an administrative tribunal. In addition, the impression is prevalent that even the courts are beginning to be willing to take judicial notice of an increasing number of categories of fact.

In connection with all this it should be stressed that the United States Government has committed itself to a policy of bureaucratic expansion which will necessitate much more latitude for administrative officials. It might also be suggested that the facts upon which the Secretary of Agriculture is to act under the present section, although complicated, will not be as involved as a rate record dealing with the extremely confused subject of valuation and reasonableness is likely to be.

VI. The judicial distrust of administrative action under which the rule of exclusive reliance on the record originated is not justified.

The rule, as indicated above, had its inception in the case of Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U.S.



88 (1913), a case hearkening back to the pre-war era, and one may also add, a pre-NRA era, during which judicial distrust of administrative action was quite often in evidence. The fears that the court entertained in that case are quite apparent from the language of the court itself:

"In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States v. Baltimore & Ohio S. W. R. R., 226 U. S. 14."

The court quite obviously was afraid that the administrative would base its action almost entirely on matters outside the record, and that this might form a cloak for corrupt practices. A comparatively recent and more moderate expression of this seeming fear is to be found in Circuit Judge Woolley's Opinion in Pa. Ry. Co. v. U. S. 40 Fed.(2nd) 921, 923 Western District Pa. (1930), wherein the Judge states:

"The Commission, an administrative tribunal, came to the trial of the issue of convenience and necessity equipped by training and experience to deal with that question adequately, and finally. Though acting as experts, the Commission must, nevertheless, have before it facts in respect to the situation on which to base its judgment. An attempt to exercise discretion or render judgment without facts would not be an exercise of discretion at all. It would be an arbitrary act and, being beyond its power, would be unlawful. United States v. Abilene & So. Ry. Co., 265 U.S. 274, 288, 44 S. Ct. 565, 68 L. Ed. 1016. So the central issue on this bill is whether there were facts in the case before the Commission and, if so, whether they were substantial enough to warrant the Commission's order, wholly without regard to our views on its action."

It is apparent in view of the present tendency toward increased governmental control over the economic life of the country that, if effective action for this purpose is to be secured, the administrative tribunals must be accorded at least a prima facie presumption of honesty and must be allowed to take comparatively summary action.

It is my conclusion that though the matter is not entirely free from doubt, the Secretary may with reasonable safety rely upon material outside the record in making administrative findings under Section 15(d) of the Act.

Francis M. Shea,  
Chief, Briefs and Opinions  
Legal Division.





No. 20

LICENSING OF PRODUCTION CREDIT AGENCIES

Section 8(3) of the Agricultural Adjustment  
Act authorizes the issue of licenses  
to production credit agencies engaged  
in the financing of potato crops.

Opinion Section Memorandum No. 32  
Dated December 15, 1933.



December 15, 1933.

MEMORANDUM TO MR. FORTAS

Dear Mr. Fortas:

Pursuant to your request of November 6, 1933, I respectfully submit my opinion as follows:

QUESTION

May production credit agencies which supply fertilizer, seed, groceries, money, etc., to potato growers be licensed under the terms of Section 8 (3) of the Agricultural Adjustment Act?

OPINION

Section 8 (3) of the Act authorizes the issue of licenses to production credit agencies engaged in the financing of potato crops.

FACTS

The marketing agreement drafted by agencies representing potato growers in seventeen states contemplates the licensing of "production credit agencies". These agencies include firms which supply fertilizer, seed, etc., to potato growers and in return obtain a security interest in the crop or payment therefor. They also include "time merchants", that is, local merchants who supply groceries, hardware, etc., and similarly secure an interest in the crop. It seems that this practice of taking a proportionate interest in the crop enables the credit agency to obtain an unconscionable return on its investment, even as much as 75 per cent where the normal rate of interest on loans would be 5 per cent. It is obvious that this practice is unfair to the producer and deprives him of a reasonable return for his labor.

DISCUSSION

(1) A LICENSE FOR THE PRODUCTION CREDIT AGENCIES IN QUESTION IS AUTHORIZED UNDER THE TERMS OF SECTION 8 (3) OF THE AGRICULTURAL ADJUSTMENT ACT.

Section 8 (3) of the Act provides in part that the Secretary of Agriculture may issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity. Investigation reveals that the word "others" was inserted to give this Section as broad a meaning as possible. Originally the provision in question read "and other agencies". "Agencies" was removed in order to widen the scope of this provision. (Cong. Rec. Vol. 77, p. 1422). The term "others" would seem, therefore, to be broad enough to include production credit agencies.

Upon the facts presented the production credit agencies in question as a part of their practice market and ship or supervise the marketing and shipping of the potatoes in which they have an interest. In the usual course of trade these commodities flow in the current of interstate commerce. It follows that these credit agencies are handling an agricultural commodity in the current of interstate commerce and therefore come within the purview of the licensing provision.

In addition, Section 8 (3) contemplates as one of the specific uses of licenses the elimination of unfair practices or charges that burden the financing of the production and distribution of agricultural products. The provision in question reads:

"Such licenses shall be subject to such terms and conditions \* \* \* \* as may be necessary to eliminate unfair practice or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof." (Underscoring supplied).

The use of licenses to eliminate unfair practices or charges levied against agricultural financing would therefore seem to be specifically contemplated by the Act.

(2) THE ISSUE OF THE SAID LICENSE WOULD BE IN CONFORMITY WITH THE PURPOSE FOR WHICH THE LICENSING PROVISION WAS ADOPTED AS REVEALED IN THE LEGISLATIVE HISTORY OF SECTION 8 (3).

Secretary Wallace, in testifying before the Senate Committee on Agriculture and Forestry, stated that Section 8 (3) "furnishes the power to prevent unfair trade practices from crippling the Act". He also stated that licensing provisions are vital "to effectuate production and marketing programs that might otherwise be defeated through practices unfair to the public or producers". As the question has been presented the licensing of production credit agencies is essential to the successful operation of the marketing agreement which potato growers in seventeen states have drafted.

Further support for the use of licenses for the purpose in question is to be found in the statement of Representative Doxey before the House. Referring to the licensing provisions, he is quoted at page 644 of Volume 77 of the Congressional Record as follows:

"He (the Secretary of Agriculture) can prevent unfair practice or charges by the processors or any agency in the marketing, financing, or handling of such commodity and impose penalties therefor."

On the foregoing analysis I conclude that licenses may be issued covering the production credit agencies in question.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.



No. 21

LICENSING TO REQUIRE USE OF  
DOMESTIC FATS AND OILS

A provision in a license issued under Section 8(3), or a marketing agreement entered into under Section 8(2), of the Agricultural Adjustment Act, or a code effective under the National Industrial Recovery Act, prohibiting the use of foreign fats and oils for domestic manufacturing purposes is of doubtful validity.

Opinion Section Memorandum No. 43  
Dated December 15, 1933.



December 15, 1933.

MEMORANDUM TO MR. FRANK

I submit herewith my opinion on the question raised in Mr. Witt's memorandum of October 14, 1933, regarding restrictions upon the use of foreign fats and oils in licenses, under the Agricultural Adjustment Act.

QUESTION

Is it permissible in a license under Section 8 (3) to require that persons subject to the license shall use only fats and oils domestically produced, except in case of necessity? May the same restriction be placed in a marketing agreement entered into under the Agricultural Adjustment Act? May the same restriction be made part of a National Industrial Recovery Act code?

OPINION

An analysis of the meaning of the power to prohibit the use of foreign agricultural commodities will show that it is very unlikely that such prohibition can be exercised through either licenses, marketing agreements, or codes. The validity of any of these prohibitions will depend upon the power vested under the Agricultural Adjustment Act and the National Industrial Recovery Act in the Secretary of Agriculture, the Secretary and the signatories to the marketing agreements, and the President or by delegation of his functions the Secretary, respectively. But whichever of the three methods be employed to prohibit the use of foreign fats and oils, its commercial effect upon the imports of these commodities will be the same. The commercial nature of the power which it is proposed to exercise by such restrictions will be the same because they cover the same fields of industry. Either the license, or the marketing agreement when universally agreed to, or the codes will impose the ban on all of those participating in any given processing of the agricultural commodities which are to be regulated. The problem of congressional intent to grant such power either under the licensing or marketing agreement sections of the Agricultural Adjustment Act or the Code Sections of the National Industrial Recovery Act is the same, because the question of intent at issue is a commercial one and the same for all three. The question is "Did Congress intend to vest in the administrative authority under consideration the power to place a virtual embargo on foreign agricultural commodities?"

That this is the commercial aspect of the question of intent at issue can be discovered from the following line of reasoning: The power of the Secretary to license or to enter into marketing agreements extends to any of the processors of any agricultural commodity. The code authority extends to any of the same processors. If a ban can be placed on the use of the foreign agricultural commodities by one set of processors, it can be done for all, and in this way effect a ban on the purchase of any foreign agricultural commodity which competes with any domestic one. The exceptional situations in which the ultimate consumer directly purchases a foreign agricultural commodity is too rare for comment. Thus to answer any of the three questions asked in the affirmative means to agree that the Congress, not in express terms, but by implication from a grant of general powers, invested the Secretary under the authority to enter into marketing agreements or issue licenses, and the President under the authority to approve or impose codes of fair competition, to place an embargo on foreign agricultural products.

Exception may be taken to calling the exclusion of foreign agricultural products from use in processing an embargo, but the Supreme Court has indicated that the two may be considered in the same terms. In Brown v. Maryland, 25 U. S. 419 (1827), the Court was considering the constitutionality of a state tax on the storage of imported goods. It had been argued that since the goods had already entered the states, this tax would not violate the prohibition against laying of "imposts or duties on imports or exports". In reply the Court said (p.439);

"There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country; the one would be a necessary consequence of the other. No goods would be imported, if none could be sold."

In discovering Congressional intent when regulating commerce and industry, one must look to the economic and commercial effects of such regulation and ask oneself the question, "Did Congress want to achieve such a commercial result and did it want to achieve it in this way?" Since there is nothing in the Agricultural Adjustment Act or the National Industrial Recovery Act code sections which definitely or anything but remotely implies that marketing agreements, licenses or codes are intended to contain such embargo provisions, sections of the Acts or previous Acts, whose effectiveness would be destroyed by such provisions or which show that Congress deals with imports by other methods, will suffice to show the lack of power. The answer to the problem in hand is based in great part on the means Congress proposes to use for restricting foreign imports and embargoes thereon as found in Section 3(e) of the National Industrial Recovery Act and the Tariff Acts. Looking to the National Industrial Recovery Act, one discovers not only that special provision is made by Section 3(e) for dealing with the problem of



foreign imports where they interfere with the operation of a code of fair competition, but that an elaborate procedure is required and a limited form of regulation is permitted. Here the President may not act alone, as he does in ordinary code matters, but must refer the matter to the United States Tariff Commission. This commission has been invested by its organic act with jurisdiction in matters of foreign trade. The procedure of Section 3(e) leaves the manner of controlling foreign imports where it was in normal times, freed from the more summary procedure in other parts of the National Industrial Recovery Act. In the face of this, it is unbelievable that Congress intended to have the Secretary exercise virtual embargo powers under Sections 8(2) and 8(3) of the Agricultural Adjustment Act without specific authorization and without reference to the traditional procedure governing such regulations of imports. In the absence of specific authorization in the Agricultural Adjustment Act it is important to consider in implying any such authority that the Secretary is an administrator, not normally having any control over imports and, that in the case of licenses no provision for hearing is given.

As for invoking the code provisions under the National Industrial Recovery Act for the purpose of preventing use of foreign commodities in domestic production, the fact that express provision is made for regulation of this character in Section 3(e) is fairly conclusive of an absence of congressional intent that implied authority for like purpose should be read into other sections. The provision in this section for careful investigation by a body trained to the task and with an elaborate inquisitorial procedure would be superfluous, if its functions could be substituted by the more summary authority of code hearings.

The fact that Section 3 (e)'s provisions are to be deemed (exclusive, as means of regulating imports under the National Industrial Recovery Act is of importance in discovering the intent of Congress as to the use of marketing agreements and licenses under the Agricultural Adjustment Act for the purpose of controlling imports. Though it be admitted that by Section 8 (a) of the National Industrial Recovery Act none of the provisions of the Agricultural Adjustment Act are to be treated as repealed or modified by the former Act, both Acts are part of a general scheme. It must be remembered that those industries which are licensed or have marketing agreements under the Agricultural Adjustment Act may also have codes of fair competition provided for them under the National Industrial Recovery Act. It seems an improbable interpretation that under a part of the general scheme foreign imports may be dealt with in a summary fashion by license, while under another part foreign imports are to be dealt with by a circumscribed and carefully elaborated procedure. This does not mean that a license may not make some provisions for foreign imports by putting them in the same category or a similar category to domestic products, but it does mean that the equivalent of an embargo is most likely confined to an exercise of the Presidential power under Section 3(e).

Consideration should be given to the Supreme Court's position on the delegation to the President of the tariff-making power in Hampton & Co. v. United States, 276 U.S. 394 (1928). The delegation of the power

to the President by the Tariff Act was upheld because the Court gave considerable weight to two factors: The specific method of ascertaining the evidence on which the President was to act and the limitations imposed on the range of Presidential action. On page 405, the Court said:

\*\*\*Congress adopted in Section 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments. There was no specific provision by which action by the President might be invoked under this Act, but it was presumed that the President would through this body of advisors keep himself advised of the necessity for investigation or change, and then would proceed to pursue his duties under the Act and reach such conclusion as he might find justified by the investigation, and proclaim the same if necessary."

The significance of such a plan and the validity of the Executive power is seen on page 409:

"If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Since the expressed constitutional opinion of the Supreme Court is not likely to be disregarded by Congress, the careful preservation of the previous tariff procedure in Section 3(a) of the National Industrial Recovery Act may be interpreted as Congressional deference to judicial opinion. If this be so, it is unlikely that Congress intended to authorize by implication other means of imposing embargoes by the terms of National Industrial Recovery or the Agricultural Adjustment Act.

A further objection to the proposed prohibition against the use of foreign fats and oils in domestic production is found in the fact that the imposition of such virtual embargoes would seriously affect revenues which the United States derives from import duties. It is not argued that import duties may not be properly affected by licenses in some particulars, but that there is grave difficulty in asserting that a Congress confronted with the serious task of balancing the budget conferred by implication power for serious interference with the revenues to be obtained from customs duties.

It is therefore concluded that a provision in a license, a marketing agreement or code prohibiting the use of foreign fats and oils in domestic production is legally of doubtful validity.

FRANCIS M. SHEA  
Chief, Brief and Opinion Section  
Office of General Counsel.





No. 22

ISSUANCE OF LICENSE IN ABSENCE OF  
MARKETING AGREEMENT

The authority to issue licenses conferred upon the Secretary under Section 8(3) of the Agricultural Adjustment Act may be exercised independently of the exercise of authority conferred by Section 8(2) to enter into marketing agreements.

Opinion Section Memorandum No. 36  
Dated December 16, 1933.



December 16, 1933.

MEMORANDUM FOR MR. COBB

Re: Cotton Ginners' Marketing Agreement.

You have asked me to advise you whether or not the cotton ginners could legally be licensed in the absence of a marketing agreement.

I understand that the cotton ginners' marketing agreement has been tentatively approved by the Secretary and is now in the field awaiting signature by the members of the industry. Your question is whether the terms of the marketing agreement may legally be incorporated in a license which will be issued prior to the agreement having been signed by a substantial part of the industry.

Section 8(3) of the Act which authorizes the use of licenses stands upon its own feet and does not require the Secretary to issue licenses only in support of marketing agreements. It is to be noted that subsections (1), (2), and (3) of Section 8 are stated as separate powers granted to the Secretary in order to effectuate the declared policy. Subsection (1) provides for reduction of the acreage or reduction in production for market, or both, of any basic agricultural commodity by agreements with producers or by other voluntary methods. Subsection (2) authorizes the Secretary to enter into marketing agreements with processors, associations of producers and others engaged in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof. Subsection (3) authorizes the Secretary to issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof.

Not only are each of the above sections separately stated, and not by terms or by implication made dependent upon each other, but as will be seen from the above summary of these subsections, subsection (3) covers more ground than does subsection (2) and so insofar as competing commodities, at least, are concerned could not be limited to an industrial activity covered by a marketing agreement. This indicates that subsection (3) was meant to give an authority capable of exercise wholly independent from subsection (2).

Statements to Congress

Certain passages in the legislative history indicate that the licenses were to be used to supplement other actions taken under the Act. In the Senate hearings on the bill, the Secretary at page 130 made the following statement:

"As to the licensing provisions, I regard them as vital. They are not an end in themselves; but are supplementary authority to effectuate production and marketing programs that might otherwise be defeated..."

In the report of the House Committee under the heading "Powers of the Secretary of Agriculture", the licensing power is described as follows:

"As a supplementary power to aid in effectuating the declared policy and in making effective the control measures taken under the bill..."

At page 11 of the Senate Hearings, the Secretary stated:

"Suppose, for instance, your commodity council had been set up under no. 2, and certain agreements had been entered into by which it was undertaken to protect the common interest of all parties involved, the interest of the producers, the processors, and the consumers, and suppose that some individual processor, some group of producers--of course, no producers are involved in this licensing; they could not be--but suppose some association or some processor deliberately tries to sabotage the agreement entered into, we have here the power to make him behave."

At the same place in the Hearings Mr. Frederic Lee stated:

"The licensing provisions would apply to such classes of processors, associations, and other agencies as the Secretary prescribed in his regulations. He is given authority further on to prescribe. The terms of the license would be left to the discretion of the Secretary of Agriculture and would in general be such as would prevent unfair practices or charges which tended to defeat the purpose of the act. It is remedial power too or ancillary power to carry out the other authority of the Secretary in trying to arrive at a better price for agricultural commodities. The license might be suspended for violation of the terms under which it is granted."

At page 13 of the Hearings the following discussion occurred:

"Mr. Lee. I would not suppose that would be necessary, Senator. It would depend on how circumstances developed. If through the reduction in acreage and the benefit payments made, or other powers exercised, the price of wheat was being raised from those operations sufficiently without undue burden to the consumer, then I would suppose no license would be necessary, but if those operations and the exercise of those powers was going on and it was found/that through trade practices or charges the producer was not receiving a fair return of the money involved, or the consumer was being charged excessive distributing costs as a result of the operations, then the licensing system might be brought into play."



It is not something that I personally would feel that the Secretary would automatically, when the act went into effect, make immediate use of. It is more in the nature of an additional remedy to care for situations that may develop, that tend to embarrass the operation of the act.

"Secretary Wallace. It would follow the commodity councils very rapidly, would it not, in all probability?

"Mr. Lee. If you had the commodity council.

"Secretary Wallace. Yes.

"Mr. Ezekiel. If I may suggest, the commodity council might substitute a voluntary agreement in place of enforced regulation through a license in industries where the commodity council and agreements under those provisions gave effective control; then the compulsory license would not be required.

"Mr. Lee. That would be my judgment, Mr. Secretary, as Mr. Ezekiel has stated, that the agreement to such provisions would be sufficient to care for your commodity councils, I think under most circumstances, without the additional aid of the licensing provision."

There are, however, other passages in the legislative history that indicate a realization that the licensing powers as conferred were capable of independent use. The above quotations are made solely to indicate that there is evidence that the Secretary and his advisors have at times regarded the license power as to be used in most cases as a supplementary device.

#### Practice of Administration

No license has yet been issued except in support of a marketing agreement which had already been adopted by a substantial part of the industry. Your proposal, of course, raises for administrative determination a sharp question of policy as to whether the prior practice with respect to licenses is to be changed in the case of the cotton ginners.

#### Constitutional Questions

The licensing powers, as you know, raise considerable constitutional difficulties. Where an individual has signed a marketing agreement and accepted benefits under the Act, he is probably not in a position to attack the constitutionality of the Act. This is one reason for preferring, as a matter of law, the use of licenses as supplementary to marketing agreements rather than as separate devices. It may also be observed that where a substantial part of the industry has agreed to certain terms under which they are to operate, the imposition of a license

containing those same terms is to that extent not involuntary, but permits the majority to carry out effectively provisions on which they have agreed and on which they have received governmental sanction. It may very well be that this procedure would be regarded by the courts as more in keeping with traditional democratic governmental actions than would be a fiat license imposed upon the entire industry regardless of its consent and it might consequently be held to be a more justifiable interference with private rights than a separate license in the absence of unusual circumstances.

Alger Hiss,  
Assistant to General Counsel.

No. 23

## LICENSING OF PRODUCERS

The legislative history of the Agricultural Adjustment Act indicates that individual producers were not intended to be subject to licensing under Section 8(3).

Opinion Section Memorandum No. 56  
Dated December 16, 1933.





December 16, 1933.

MEMORANDUM TO MR. PRESSMAN

In reply to your inquiry concerning the legislative history of Section 8(3), I submit the following:

OPINION

The legislative history of the Agricultural Adjustment Act indicates that individual producers were not intended to be subject to licensing under Section 8(3).

I.

The original wording of Section 8(3), as discussed in the Senate hearings, was definitely understood to exclude producers as such.

As originally introduced, Section 8(3) provided for the licensing of "processors, associations of producers, and other agencies".

In the Hearings before the Senate Committee on Agriculture and Forestry, March, 1933, p. 11, Secretary Wallace made the following statement:

"Sec'y                      Suppose, for instance, your commodity council had been set up under no. 2, and certain agreements had been entered into by which it was undertaken to protect the common interest of all parties involved, the interest of the producers, the processors, and the consumers, and suppose that some individual processor, some group of producers -- of course, no producers are involved in this licensing; they could not be -- but suppose some association or some processor deliberately tries to sabotage the the agreement entered into, we have here the power to make him behave. ....

Wallace:

Capper:                      This requirement of the license applies only to associations of producers, and not to individual producers?

Sec'y                      That is right, associations of producers are listed here. They should be listed."

Wallace:

The same question is discussed on page 14 of the Hearings:

"Chairman: In contemplation of a license being issued, any one who has a license and violated the provisions of it, he is then estopped from any protection or any distribution? May I ask, Mr. Lee, if your interpretation of the licensing feature is that once he is compelled by the Secretary to take out a license and he violates the terms of the license, then he is forbidden to produce or to manufacture?

Lee: It would be within the power of the Secretary to suspend or revoke the license, and if it was suspended or revoked, then he could not operate further in distribution without subjecting himself to the criminal penalty. But the licensing provisions, Senator, may I say once more, do not apply to individual producers, as I understand your inquiry to imply."

## II.

The amendment substituting "others" for "other agencies" in Section 8(3) was a formal one and indicated no intent to include producers within the provisions for licensing.

As reported from the Senate Committee on Agriculture and Forestry, the bill was amended by striking out "other agencies" and inserting the word "others". This change was adopted by the Senate, and as Senate Amendment No. 19 was acceded to by the House.

The history of the amendment indicates that the change from "other agencies" to "others" was simply a matter of perfecting the drafting of the bill. The section originally provided that "any agency engaged in such handling without a license" should be subject to a fine. This was obviously defective in that it would not have provided any penalty for a person who could not be brought within the term "any agency". The word "agency" was, therefore, stricken out and the words "such person" substituted. These amendments were reported (77 Cong. Rec. 1422) in the following perfunctory manner:

"Presiding Officer: The next amendment was, on page 7, line 16, after the word "and", to strike out "other agencies" and insert "others"; in line 19, after the word "competing", to strike out "agricultural"; on page 8, line 5, after the word "thereof" and the period,

to insert "Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law"; and in line 7, after the word "Any", to strike out "agency" and insert "such person", \* \* \*

Nothing in the debate in the Congress indicates that the intent of the amendment was to make it permissible to license producers.

### III.

The debate in the Senate and House indicates no intent to reach back of processing and distributing to license the producer as such.

In the Senate there was some discussion of the possibility of licensing producers who incidentally process and market some part of their produce. At the time of this debate Section 8(3) was limited to apply only to those handling "any basic agricultural commodity or product thereof". Senator Smith, in charge of the bill, was interrogated as follows: (77 Cong. Rec. 1337)

"King:

Does the bill mean that, for instance, a man who is running a little gristmill in some remote portion of the United States, who buys wheat from the farmer, grinds it into flour, bran, and shorts, would have to obtain a license in order to operate his mill?

Smith:

If he did not enter into an agreement beforehand he would, provided he was carrying on the business for commercial purposes.

King:

One would be operating a mill only for commercial purposes.

Smith:

Certainly.

King:

As the Senator knows, in many sections of the country, women, and men, too, for that matter, take fruit during the fruit season and can a limited amount in their own kitchens or in their own homes, put it upon the market, and dispose of it; and in some places it has a limited market because of its superior quality. I suppose the woman who thus takes the fruit and manufactures it into a commodity for sale in a limited area would have to obtain a license.

Smith: There is a modification in the bill which I will come to covering that matter."

The legislative history does not make clear which modification of the bill it was, to which Senator Smith had reference. It was, apparently, however, Section 15(b) which relates to the processing tax and which permits the Secretary to "exempt from the payment of the processing tax the processing of commodities by or for the producer thereof for sale by him where, in the judgment of the Secretary, the imposition of a processing tax with respect thereto is unnecessary to effectuate the declared policy". That the exemption of the producer from a processing tax was considered in connection with his exemption from the requirement of a license is indicated in the following debate:

"Smith: There was no particular language limiting the home-consumption idea. After the committee had considered it at length, they agreed that wherever a farmer processed his product himself he should not be limited, or where he got some one to process it for him. To illustrate, a farmer carrying his corn to the grist mill and having it converted into meal would not pay a tax; neither would there be a license required by the mill that processed it for his consumption. That was not in the first bill, because the Senator from Nebraska brought it up; so they finally agreed upon this language. I think the Senator from Nebraska drew this wording:

'The Secretary of Agriculture may provide by regulations for exemption from the tax of commodities processed by the producer thereof or processed for the producer.'

I admit that it is pretty broad, but it is in the bill.

Norris: That is all within the regulations. :

Smith: Yes; that is all within the regulations.

Norris: Of course, the Secretary could provide that it should not apply to a man who owned a million hogs, or a thousand hogs, and processed them.

\* \* \* If a farmer makes some sausage and takes it to town and sells, nobody wants to compel him to take out a license or to pay a tax. That would make the bill ridiculous.\*\*\*"



Throughout the debate on Section 8(3) discussion is confined to those engaged in processing and distributing. Frequently the term "processor" alone is employed in describing the class of persons falling within the scope of the Section. See, for example, 77 Cong. Rec. 1367. The definitely indicated purpose was to reach "the handlers of farm products and the processors of farm products", who, in the absence of regulation through the licensing device "would be able to take the benefits under this bill away from farmers". See statement of Representative Fulmer, author of the bill in the House. 77 Cong. Rec. 1294.

It is therefore submitted that an analysis of the legislative history indicates that individual producers, as such, were not regarded as falling within the terms of Section 8(3).

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.



No. 24

REDUCTION OF PROCESSING TAX UNDER  
SECTION 15(a) OF THE AGRICULTURAL ADJUST-  
MENT ACT

Under the terms of Section 15(a) of the Agricultural Adjustment Act, the processing tax upon a commodity used in the manufacture of a low-priced product may be reduced in such amount as may be necessary to prevent substantial reduction in the use of that commodity as compared with others in the manufacture of such low-priced product.

Opinion Section Memorandum No. 38  
Dated January 5, 1934.





January 5, 1934.

MEMORANDUM FOR MR. SAVOY

Pursuant to your request, I respectfully report my opinion as follows:

Question

Is it permissible to reduce the processing tax on flue-cured tobacco used in the manufacture of cut plug from 4.2 cents per pound to 3 cents per pound?

Opinion

The processing tax upon a commodity used in the manufacture of a low-price product may be reduced in such amount as may be necessary to prevent substantial reduction in the use of that commodity as compared with others in the manufacture of such low-price product.

Pertinent Section of the Agricultural Adjustment Act.

Section 15 (a) provides:

"If the Secretary of Agriculture finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that any class of products of any commodity is of such low value compared with the quantity of the commodity used for their manufacture that the imposition of the processing tax would prevent in whole or in large part the use of the commodity in the manufacture of such products and thereby substantially reduce consumption and increase the surplus of the commodity, then the Secretary of Agriculture shall so certify to the Secretary of the Treasury, and the Secretary of the Treasury shall abate or refund any processing tax assessed or paid after the date of such certification with respect to such amount of the commodity as is used in the manufacture of such products."

History and Application of the Section.

In the Senate Hearings the following discussion of Section 15(a) took place (p.51):

MR. TUGWELL. That section--that provision of that section--has to do with the prevention of the incidence of the tax falling on the producer, and allows discretion if it is found that the imposition of the tax causes consumption to decline.

SENATOR NORRIS. Can you give us an illustration of where that would apply?

MR. TUGWELL. Will you explain that, Mr. Ezekiel?

MR. EZEKIEL. Practically all of these products, certain portions of them are used for subsidiary products of very low value; for example, wheat, there is cracked wheat for chicken feed. This would permit the Secretary to exempt the processing of wheat for animal feed, or bran, from the tax on wheat.

Likewise a considerable quantity of cotton is used in the manufacture of bags which compete with paper, such as the bags they sell oranges in in retail stores. This would permit cotton used for such purpose to be exempt from the tax and would permit cotton to displace paper in those uses.

And in tobacco, certain low grades of tobacco are processed and manufactured in nicotine and other byproducts which would not be used unless they could be acquired at a low cost.

THE CHAIRMAN. And in the manufacture of these byproducts, if we find that the imposition of the tax will so increase the price as to have a competitor used in the place thereof, they can remit the tax?

MR. EZEKIEL. That is right.

SENATOR MCGILL. In other words, it will be used to prevent the substitution of some other commodity for the commodity benefited?

MR. EZEKIEL. Yes.

SENATOR NORBECK. Can it be renewed as well as abolished, the tax, under the provisions of this law?

MR. TUGWELL. Yes.

-----  
The House Committee on Agriculture in reporting the bill made the following statement (73rd Cong. Report No. 6, p. 5):

"There is to be an exemption from the processing tax of any class of products of a commodity of such low value, compared with the quantity of the commodity used for their manufacture, that the imposition of the tax would prevent in whole or in large part the use of the commodity in the manufacture of such products."

In the present situation it appears that the imposition of a tax of 4.2 cents per pound upon flue-cured tobacco results in a substantial decrease in the use of such tobacco in making cheap cut plug in favor of the use of Burley tobacco on which the processing tax is only 2 cents. A reduction of the tax to 3 cents per pound would eliminate the competitive advantage now enjoyed by the Burley tobacco by reason of a comparatively low processing tax.

Section 15(a) is applicable in this situation because:

- (1) The imposition of the 4.2 cents tax "would prevent in whole or in large part the use of the commodity in the manufacture of such products."
- (2) Cut plug constitutes a "class of products" of the commodity (tobacco) of "low value compared with the quantity of the commodity used for their manufacture." It must be conceded that this language of the Act, in specifying the relation between the low value of the product and the quantity of the commodity used is somewhat obscure. The type of situation contemplated, however, as reference to the legislative history above quoted abundantly indicates, is precisely that which is here presented of a commodity the demand for which for a certain use is dependant on its availability at a low price as compared with available substitutes.

The only serious problem presented is that of finding in the statute authority to fix upon a commodity a different rate of taxation according to its use.

#### Discussion.

##### I.

Section 15 (a) makes it a duty of the Secretary, upon a finding of certain facts, to certify that the processing tax would prevent in whole or in large part the use of the commodity in the manufacture of the class of products described.

The language of Section 15 (a) is that upon the stated finding, the Secretary of Agriculture "shall so certify."



Whether this language is peremptory or merely permissive in character depends not so much upon its form as upon the statutory purpose. It is a controlling rule of statutory construction that when a power is given to public officers, whenever the public interest or an individual right calls for its exercise, the statute is peremptory. U. S. v. Cornell Steamboat Co., 137 Fed. 455 (1905): Supervisors v. U. S., 4 Wall. 435 (tax levy); Brenner v. City of Los Angeles, (Cal.) 116 P. 327 (1911) (tax refund); Attleboro Trust Co. v. Commissioner of Corporations and Taxation. (Mass.) 153 N. E. 333 (1926) (tax abatement).

In Minor v. Mechanics' Bank, 1 Pet. 44, 63 (1828), in construing the use of the word "may", the court referred to the "well known rule in the construction of public statutes, where the word 'may' is often construed as imperative."

"Without question such a construction is proper, in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject further than that that exposition ought to be adopted in this as in other cases, which carries into effect the true intent and object of the legislature in the enactment."

In U. S. v. Cornell Steamboat Co., 137 Fed. 455 (1905), the statute in question authorized the Secretary of the Treasury, to abate or refund duties upon merchandise upon proof of its destruction by fire or other casualty while in the custody of customs officers. The court held that the Secretary, if satisfied by proper proof of the requisite facts, might not refuse to allow the refund arbitrarily, since such refusal would defeat the object of the statute.

The object of the tax abatement provided in 15(a) is not in doubt. It is an essential part of the legislative policy evidenced not only in this but in other sections of the act that the processing tax shall not, by decreasing the consumption of the commodity taxed, operate to the detriment of the producer. While it may not be imperative that the Secretary undertake investigation to determine the facts called for by Section 15(a), the facts having been found, the legislative purpose requires that action be taken to abate the tax.



II.

The statutory purpose requires that the tax be abated to the extent, and only to the extent, necessary to enable the commodity to compete with available substitutes.

While the object of the processing tax is to obtain revenue for the extraordinary expenses incurred by reason of the national economic emergency, the various tax provisions of the Act are designed to permit such adjustments as will prevent decrease in consumption of the taxed commodity. Thus Section 9(a) provides for adjusting the rate of the tax to effectuate the declared policy; Section 9(b) provides a procedure for adjustment in the event that the Secretary finds that the tax is likely to decrease domestic consumption; Section 15(d) provides for fixing a compensating rate of tax upon a competing commodity; and Section 15(e) provides for a compensating tax equal to the amount of the processing tax to be laid on any imported article processed or manufactured wholly or in chief value from the taxed commodity. It is apparent that all of these provisions provide for adjustment of the rate of tax, or for the imposition of taxes on competing articles, for the purpose of preserving, against the affects of the tax, the normal amount of domestic consumption of the commodity and its relative position in competition with substitutes.

Section 15(a), for the same purpose, permits the adjustment of the tax as to a part of the commodity according to its use. In the present instance the threatened decrease of flue-cured tobacco is due, not to the fact that a taxed commodity has to compete with an untaxed commodity, but that the flue-cured tobacco has to compete with a commodity which is taxed at a lower rate. The object of the provision, accordingly, cannot be accomplished by abating the entire tax on flue-cured tobacco. To do so, leaving a tax upon the Burley tobacco, would inevitably lead to a decrease in the use of Burley as compared with the flue-cured tobacco. To proceed further and remove the tax on Burley, would be to defeat even more decisively the policy of the Act which requires that funds be available for financing the reduction programs. Hence, to apply this Section 15 (a) in a manner to effectuate the policy, requires that the tax on the one type of tobacco be adjusted with reference to the tax on the other.

As the basis for this adjustment it is necessary that the Secretary of Agriculture, in certifying the effect of the tax, shall set forth the true situation and indicate the extent to which the tax exceeds the rate which would preserve the relative competitive position of the commodity.

### III.

The use of the word "abate" is consistent with reducing the rate of the tax to the extent necessary to accomplish the legislative purpose.

In certain applications "abatement" carries with it the sense of total destruction or elimination. Thus, it is said:

" 'Abate' is a generic term, derived from the French word 'abattre', and means to beat down, or destroy."  
Case v. Humphrey, 6 Conn. 130, 140.

However, the application in that case was to the abatement of a writ. Similarly, with an action at law, when a suit is abated it is absolutely dead while, on the other hand, a suit in equity when abated is merely in a state of suspended animation. Witt v. Ellis, 42 Tenn. 38, 39-40; Kelly v. Rochelle, (Tex.) 93 S. W. 164, 166; Spring v. Webb, (Vt.) 227 Fed. 481, 483. And "abatement" of a legacy is the term commonly used for a pro rata diminution of legacies in order to pay debts or specific charges upon the estate. Brown v. Brown, 79 Va. 648, 650; In re Hawgood's Estate, 159 N. W. 117, 37 S. D. 565.

In connection with taxation, abate is commonly used as meaning to reduce. Webster's New International Dictionary (1933) gives as one of the definitions of abate:

"3. To reduce or lower in amount, number, degree, intensity, etc., to lessen; diminish; moderate;  
as to abate, or reduce the amount of, a tax."

That the term comprehends both entire and partial elimination of a tax is confirmed by reference to the language of statutes and judicial opinions. Thus Gen. Laws Mass., c 62, Sect. 43 gives any person aggrieved by an assessment the right to complain and provides that "if, after a hearing, the commissioner finds that the tax is excessive in amount or that the person assessed is not subject thereto, he shall abate it in whole or in part accordingly." "Abate" and "reduce" are used interchangeably in State v. Wells Fargo & Co., (Minn.), 179 N. W. 221 (1920) in discussing the powers of the Tax Commission:

"It could not abate the percentage at which particular property may be subject to ad valorem taxation as provided in G. S. 1913 s 1938. No more can it reduce the percentage of gross earnings to be exacted."

And see City of Mandan v. Nichols, (N.D.) 243 N. W. 740 (1932) as an example of reducing an assessment under an abatement statute, and Lisbon Village District v. Town of Lisbon, (N.H.) 155 A. 252 (1931), holding, on a tax abatement plea, that as the property taxed was exempt "the whole tax thereon is to be abated."

Using the term "abate", therefore, in its ordinary meaning as applied to taxation, the provision that "the Secretary of the Treasury shall abate" must be taken as meaning that the Secretary shall eliminate the tax entirely, or reduce the rate thereof, according to the facts certified by the Secretary of Agriculture.

#### IV.

Section 15(a) confers no exemption and can give rise to no cause for complaint so long as the tax is not so high as to cause a decrease in the use of the commodity in the manufacture of the low price product.

Commodities which are used, in part, in the manufacture of cheap class products are not exempt from taxation under the Act. Section 9(a), in providing for the determination of the processing tax makes no distinction based upon the use of the commodity. Section 9(b) provides for definite exemptions. No tax is to be required on the processing of a commodity by or for the producer thereof for home consumption. The Secretary is given power to exempt the processing of commodities by or for the producer thereof, for sale by him when the tax is unnecessary to effectuate the declared policy.

These exemptions are in keeping with the purpose of the Act to benefit producers, since the tax on commodities to be used or marketed by him would fall upon the producer directly. They are to be sharply distinguished from provisions for abating processing taxes upon commodities for the use, and under the control, of others. The abatement of the tax permitted by 15(a) is clearly not designed to benefit such other persons. The basis for the abatement is solely the decrease in consumption which is inimical to the effectuation of the policy of the Act. It follows that Section 15(a) must be construed so as to accomplish its public purpose, and not strictly in favor of the taxpayer. So construed, the statute must be deemed to authorize such abatement of the tax as will prevent decrease in consumption for the uses indicated without thereby placing a competing commodity, also subject to a processing tax under a disadvantage of precisely the character which the abatement provision was designed to eliminate.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.





No. 25

APPLICATION OF NATIONAL  
INDUSTRIAL RECOVERY ACT CODES TO  
CERTAIN EMPLOYERS

Each of the following listed classes of employers may be subject to a code of fair competition, under the National Industrial Recovery Act, subject to exemption in individual cases where the facts clearly disclose that the individual employer falls within the category exempted by the Executive Order dated October 23, 1933: employers in towns of less than 2500 population (outside the immediate trade area of a city of larger population) employing less than 5 persons in the following classifications: (1) retail feed dealers, (2) feed manufacturers, (3) flour and grain millers, (4) ~~ba~~kers, (5) country elevators, (6) food distributors other than retail grocers.

Opinion Section Memorandum No. 45  
Dated January 25, 1934.



January 25, 1934.

Memorandum to Mr. Cochran

Pursuant to your request, I submit my opinion upon the following question:

QUESTION

In towns of less than 2,500 population outside the immediate trade area of a city of larger population, would concerns employing less than five persons in the following classifications be subject to an approved code of fair practice under the National Industrial Recovery Act.

- (1) Retail feed dealers,
- (2) Feed manufacturers,
- (3) Flour and grain millers,
- (4) ~~Ba~~kers,
- (5) Country elevators,
- (6) Any food distributor other than retail grocers (especially grain jobbers and others handling wheat, corn, and other grain products).

CONCLUSION

Each of the listed classes of employers may be subjected to an approved code of fair competition, under the National Industrial Recovery Act subject to exemption in individual cases where the facts clearly disclose that the individual employer falls within the category sought to be exempted from such codes by the Executive Order, dated October 23, 1933.

ANALYSIS OF THE QUESTION

The constitutionality of the National Industrial Recovery Act is assumed.

The question presents the following basic subsidiary questions:

- (1) Does the National Industrial Recovery Act by its terms subject the listed classes of employers to approved codes of fair competition under the National Industrial Recovery Act?

- (2) Does any Executive Order transferring any function under the National Industrial Recovery Act to the Secretary of Agriculture or retransferring any such function from the Secretary of Agriculture to the Administrator of the National Industrial Recovery Act relieve any of the listed classes of employers from the obligations of approved codes of fair competition under the National Industrial Recovery Act?
- (5) Are any of the listed classes of employers exempted from the obligations of codes of fair competition under the National Industrial Recovery Act by the terms of the Executive Order of October 23, 1933?

#### DISCUSSION

##### I.

The National Industrial Recovery Act, by its terms subjects the listed classes of employers to approved codes of fair competition, under the National Industrial Recovery Act.

The National Industrial Recovery Act, Section 1, expressly recognizes and declares to exist

"A national emergency productive of widespread unemployment and disorganization of industry which burdens interstate and foreign commerce, affects the public welfare, and undermines the standard of living of the American people."

The Act then states the declared policy of Congress to be

"to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily



required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

The Act, by its terms recognizes its character as an emergency measure and, expressly limits its effective period and the term of existence of the agencies created under it to two years (Section 2 (c) National Industrial Recovery Act).

To effect its declared policy the Act authorizes the President, within the limits of a broad discretion, to establish codes of fair competition and agreements applicable to all trade or industrial associations or groups, and to utilize other devices set forth in the Act, all designed to relieve the national emergency, remove obstructions to the free flow of interstate and foreign commerce and achieve the other declared purposes of the Act by means of a coordination of all national trade and industry during the period of the emergency. The President is expressly authorized to prescribe such exceptions to and modifications of the codes and other coordinating instrumentalities as in his discretion he deems necessary to effect the policy of the Act. The scope of the Act, by its terms contemplates a coordination of all trade or industrial groups, without exception or qualification.

More specifically, those provisions applicable to codes of fair competition, pertinent to this inquiry, cover all trades and industries. Title 1, section 3 (a), authorizes the President to approve codes of fair competition for a "trade or industry or subdivision thereof," without express exception of any class or group within the trade or industry. Section 3 (b) provides that, after approval, the provisions of such a code "shall be the standards of fair competition for such trade or industry or subdivision thereof". Section 3 (d) authorizes the President, either upon his own motion or upon complaint of abuses in the trade or industry inimical to the public interest or the declared policy of the Act, after notice and hearing, to prescribe and approve a code having the same effect as an approved code submitted by an industrial association or group under Section 3 (a) upon "any trade or industry or subdivision thereof" for which no code has theretofore been approved. Section 7 (b) authorizes the President, to approve agreements between employers and employees "in any trade or industry" as to conditions and terms of employment and by such approval to establish standards with respect thereto which, when approved, are given the effect of a code of fair competition. Section 7 (c) authorizes limited codes of fair competition applicable to "any trade or industry". These and other provisions of the National Industrial Recovery Act relating to codes of fair competition and defining their effect make no exception by their terms of any trades or industries or special classes or groups therein from their provisions. They apply equally to all trades or industries and subdivisions

thereof. Their application must, of necessity be general to effect the declared policy of the Act.

The listed classes of employers comprise either trades, industries or subdivisions thereof, and are, therefore, within the terms of the Act. Unless the effect of the Act is otherwise limited, they are subject to approved codes of fair competition.

None of the listed classes of employers is exempted as a class by the provisions of Title 1, Section 5 of the National Industrial Recovery Act which provides "nor shall anything in this Act, or regulation thereunder, prevent anyone from marketing or trading the produce of his farm." This provision might relieve some individuals among the listed classes from such provisions of approved codes as prevent them from selling the produce of their own farms. It is not, however, applicable generally to the listed classes of employers, as classes, in the normal course of their business.

Nor is any of the listed classes of employers relieved of the obligations of an approved code under the National Industrial Recovery Act, by reason of the provisions of Section 8 (a) of the National Industrial Recovery Act which specifically provides against any construction of any of its provisions which would repeal or modify any of the provisions of the Agricultural Adjustment Act which had been passed previously. Examination of the Agricultural Adjustment Act discloses no provision of that Act inconsistent with the applicability of codes of fair competition under the National Industrial Recovery Act to any of the listed classes of employers. It should be noted, however, that Section 8 (b) of the National Industrial Recovery Act provides for delegation of the functions of the President under that Act to the Secretary of Agriculture in order to avoid conflict in the administration of the National Industrial Recovery Act and the Agricultural Adjustment Act, and that the Executive Order of January 8, 1934, excludes the use of codes under the National Industrial Recovery Act to impose regulations which Marketing Agreements and Licenses under the Agricultural Adjustment Act normally cover, unless the Secretary of Agriculture lends his sanction thereto. Consequently, the provisions of the National Industrial Recovery Act with respect to codes, by its terms applies to the listed classes of employers.

It is apparent, therefore, that the Act, by its terms and within the scope of its declared policy, contemplates that all of the listed classes of employers shall be subject to approved National Industrial Recovery Act codes of fair competition.

II.

The Executive Orders transferring administrative functions with reference to codes of fair competition under the National Industrial Recovery Act from the Administrator of the National Industrial Recovery Administration to the Secretary of Agriculture, and retransferring certain of such functions from the Secretary of Agriculture to the Administrator of the National Industrial Recovery Administration have no effect upon the applicability of such codes of fair competition to the listed classes of employers and do not relieve any of such employers from the obligations of such codes.

Section 8 (b) of the National Industrial Recovery Act provides

"The President may, in his discretion, in order to avoid conflicts in the administration of the Agricultural Adjustment Act, and this title (National Industrial Recovery Act), delegate any of his functions and powers under this title with respect to trades, industries, or subdivisions thereof, which are engaged in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof, to the Secretary of Agriculture."

Acting under the authority of this Section, the President, by Executive Order #6182 on June 26, 1933, delegated to the Secretary of Agriculture certain functions and powers vested in the President by the National Industrial Recovery Act, and gave the Secretary of Agriculture authority, subject to approval of the President, to determine all but certain specified provisions of the codes with respect to stipulated trades, industries, or subdivisions thereof, engaged principally in the handling of specified agricultural commodities, and to administer such codes. The authority thus delegated to the Secretary of Agriculture was expressly continued in effect and extended to cover additional trades or industries engaged principally in the handling of other specified agricultural products by supplementary Executive Orders #6207, July 21, 1933, and #6345, October 20, 1933.

Subsequently, by Executive Order #6551, dated January 8, 1934, certain of these functions and powers, previously delegated to the Secretary of Agriculture by the above-mentioned series of Executive Orders, were re-transferred and delegated to the Administrator of the National Industrial Recovery Act. This retransfer made subject to the approval of the Secretary of Agriculture terms and conditions of such codes relating to the handling of agricultural commodities which might come in conflict with regulations imposed by marketing agreements or licenses under the Agricultural Adjustment Act. The Order



also accepted from the transfer and left with the Secretary of Agriculture the duty to determine the provisions of and to administer codes relating to certain trades or industries, specified in the Order, engaged principally in the handling of certain specified agricultural products.

None of these Executive Orders except any particular trade or industry or subdivision thereof form the operation of codes of fair competition. In each case, the orders merely alter the designation of the official to whom the President has delegated the duty of administering the National Industrial Recovery Act in its application to such trades or industries as fall within the terms of the Orders.

Consequently, none of these Executive Orders relieve any of the listed classes of employers from the possible jurisdiction of approved codes of fair competition under the National Industrial Recovery Act.

### III.

None of the listed classes of employers is exempted from the obligations of approved codes of fair competition under the National Industrial Recovery Act by the terms of the Executive Order of October 23, 1933.

This order provides in substance that neither the President's Reemployment Agreement nor obligations not voluntarily assumed under approved codes of fair competition shall be held to apply to

"employers engaged only locally in retail trade or in local service industries (and not in a business in or affecting interstate commerce), who do not employ more than five persons, and who are located in towns of less than 2500 population (according to the 1930 Federal Census), which are not in the immediate trade area of a city of larger population." (underscoring supplied)

except so far as such employers should desire to continue with the terms of the President's Re-employment Agreement, or choose to voluntarily assume the obligations of a code.

The question under consideration in this memorandum specifies that the listed classes of employers employ less than five persons, and are located in towns of less than 2500 population not in the immediate trade area of a city of larger population. Therefore, in determining whether any of them are relieved of the obligations of approved codes of fair competition by this Executive Order, it is necessary to determine only whether the actual functions performed by each of them bring them within any of the following classifications, as a matter of practical or legal definition:



(1) Those exempted,

- (a) Employers engaged only locally in retail trade, not in or affecting interstate commerce.
- (b) Employers engaged only in local service industries not in or affecting interstate commerce.

In determining whether any of the listed classes of employers fall within the categories exempted by the Executive Order it is necessary to determine first, the scope of the language of the Order defining each category, and second, the typical practices or manner of doing business of each of the listed classes of employers.

The only available interpretations of the Order and of the expression "engaged only locally in retail trade or in local service industries" are to be found in statements of the Administrator of the National Industrial Recovery Act, and in rulings of that Administration as to the scope of the exceptions.

The Administrator of the National Recovery Administration stated on October 30, 1933, that

"The Executive Order of October 23, 1933\*\*\*applies only to employers engaged in trades or services of which the operations are customarily confined to local areas. It does not apply to those trades or services in which operation ordinarily extend over a relatively wide area and include a number of communities."

(Underscoring supplied.)

The National Recovery Administrator ruled that employers engaged in selling at retail such products as lumber, building specialties, builders' supplies and coal are not exempted by the order, for the reason that their activities are not "confined to local areas." (National Recovery Administrator's statement of October 30, 1933 above).

The Associate Counsel of the National Industrial Recovery Administration has ruled that motor vehicle retailers employing less than five persons in towns under 2500 are not exempted by the Order, stating

"The operations of a retailer of automobiles 'are not confined to local areas' but ordinarily 'extend over a relatively wide area, and include a number of communities'. Persons engaged in selling motor vehicles at retail cannot, therefore, be considered as engaged in local retail trade within the meaning of the Executive Order.

"It follows that employers engaged in the motor vehicle trade are bound by all the provisions of the code of fair competition for the motor vehicle trade regardless of the size of the town in which their place of business is located."

Release #1625, November 9, 1933;

Ruling by Blackwell Smith, Associate Counsel, N.R.A.

A further memorandum of the Legal Division of the N. R. A., dated November 29, 1933, from Thomas I. Emerson, Assistant Counsel to C. A. Weisiger, quotes Mr. Richberg to the effect that banks in towns of 2500 or less are not exempted by the Order of October 23, 1933 and remain subject to the code.

It is desirable that in so far as possible conflict should be avoided in the interpretations of the two administrations. Some reference therefore should be given to this apparently settled administrative interpretation of the N. R. A. Furthermore this strict interpretation accords with the limited character of the exemptions intended as expressly stated in the Order:

"This exemption is intended to relieve small enterprises in small towns from fixed obligations which might impose exceptional hardship; but it is expected that all such enterprises will conform to the fullest extent possible with the requirements which would be otherwise obligatory upon them."

(Executive Order of Oct. 23, 1933.) (Underscoring supplied.)

The further requisite which must be satisfied under the Executive Order to exempt a business from the operation of an otherwise applicable code is that it not be "in or affecting interstate commerce."

Without undertaking an unnecessarily detailed analysis of the pertinent decisions, it may be stated that the courts, in cases in which the scope of the expression "in or affecting interstate commerce" received most careful analysis as determinative of the normal limits of State and Federal powers have laid down the broad principle that interstate commerce is "not a technical or legal conception, but a practical one, drawn from the course of business."

See Stafford et al. v. Wallace et al., 258 U.S. 495, 42 S. Ct. Rep. 397; 66 Law Ed. 735 (1922); Savage v. Jones, State Chemist of the State of Indiana, 225 U.S. 501 (1912); Swift & Co. v. United States, 196 U.S. 375, 25 S. Ct. Rept. 276; 49 Law Ed. 518 (1905).

and that where the nature of the business is such, that although the

business itself does not constitute commerce between the states, unwholesome practices in the industry or local state regulation are directly reflected in a restrictive effect upon interstate commerce, the Federal Government may regulate the business to protect interstate commerce.

See Board of Trade of the City of Chicago, et al. v. Olsen, 262 U.S. 1, 43 S. Ct. Rep. 470, 67 Law Ed. 839 (1923);  
Stafford et al. v. Wallace et al., 258 U.S. 495, 42 S. Ct. Rep. 397, 66 Law Ed. 735 (1922);  
Lemke et al. v. Farmers Grain Co. (of Emden, N. Dak.), 258 U.S. 50, 42 S. Ct. Rep. 244 273 Fed. 635, 66 Law Ed. 458 (1922).

With these principles in mind it seems apparent that the parenthetical expression of the Executive Order "(and not in a business in or affecting interstate commerce)" was used in the order not with any studied significance, nor in any highly technical sense, but merely to emphasize the limited scope of the exemption conferred--to indicate that the exemption was intended to extend only to a definitely limited class of local industries and not to those industries, which, despite the fact that individually they are small in size and located in small communities, as classes require continued control through codes because of their direct effect upon interstate commerce.

Thus, read in the light of the declared purpose of the National Industrial Recovery Act, in the light of the intention, apparent from the terms of the Order itself, to limit exemptions under the Order to those employers clearly within its terms, and in the light of the narrow administrative interpretations placed upon it by the National Recovery Administration, it becomes apparent that a strict construction should be placed upon the language of the Order, and no trade or industry held categorically to be exempted by the Order unless it clearly appears that the exemption applies to it.

The Listed Classes of Employers Do Not Clearly  
Fall Within the Meaning of the Language of the  
Executive Order of October the 23rd Exempting  
Certain Classes of Employers from the Operation  
of Codes under the National Industrial Recovery  
Act.



(1) Retail feed dealers and feed manufacturers.

These two classes may be considered together. Small retail feed dealers customarily operate small mills or grinders, at their places of business, thus performing a manufacturing function in addition to simple retailing. Feed manufacturers employing less than five persons customarily operate in identically the same way. They perform the same functions and from a practical point of view constitute but one classification, as distinguished from the separable class of large feed manufacturers who operate nationally and present quite different problems.

These retail feed dealers and small feed manufacturers, crack and grind various grains used as feed, and mix them with other feed materials, such as grains, cottonseed, gluten feed and the like, derived from various sources, both local and from other states. They normally sell the product of this processing within a radius of not to exceed 50 miles. Sales may be across state lines or not, depending upon where the business is located with reference to the state border.

This class of employers presents, in typical cases, a subdivision of a trade or industry which derives its raw material in part at least from extra-state sources, through interstate commerce, performs an essential function of grinding and mixing these feeds with material from local sources, and disposes of the resultant product within a comparatively restricted area of 50 miles radius or less which may involve interstate sales or not.

From this statement of their functions it appears that so far as the disposition of their product is concerned, retail feed dealers are possibly, though not clearly, engaged in a certain sense in a local service industry or locally in retail trade. On the other hand, they perform additional processing functions. In typical cases they are handling, processing and selling food products received by them in the course of customary trade practice, in part at least from sources outside the state. As to these materials, they act as an essential integral agency of the established system for distribution of these products passing in interstate commerce. Consequently unfair trade practices within the industry would directly affect interstate commerce by interfering with or restricting the flow of feeds to their normal market. It appears, therefore, that they perform a function which constitutes either a part of or directly affects the flow of interstate commerce in grains and feeds. Consequently they do not clearly fall within the exemption of the Executive Order of October 23rd, and as a class can be held subject to codes.

If, in individual cases, individual retail feed dealers or feed manufacturers should show that they derive all their materials from intrastate sources, and sell only locally within a small area,



they could establish as individuals, their right to exemption under the Executive Order.

(2) Flour and corn millers.

Flour and corn millers employing less than five persons, and located in communities of less than 2,500 population, are less likely in typical cases to receive their raw materials from outside the state. Such millers often receive local grain and sell locally, but in many cases there is both receipt of material and sale of product in interstate commerce. It is not clear, as a matter of practical definition, that such flour and corn millers, as a class, are not in a business in or affecting interstate commerce. It is not clear that they are, as a class, engaged only locally in retail trade or local service industries, nor can it be said with assurance that, as a class, their "operations are customarily confined to local areas." Therefore, it can not be said that, as a class, they fall within the exemption of the Executive Order of October 23rd under the principles discussed above, which indicate a strict interpretation of the language conferring the exemption. Such corn and flour millers may be subjected to codes of fair competition unless, in individual cases, they show that they fall within the exemption.

(3) Bakers

Bakers employing less than five persons in communities of less than 2,500 population, as a class, sell their products only locally, but customarily receive flour and other materials from outside the state, and within the principles laid down by the cases above cited, are engaged in a business in which unfair trade practices and conditions sought to be controlled by codes would directly affect interstate commerce in grains and flour. Therefore, as a class, they appear not to be clearly exempted by the Executive Order of October 23rd from the application of codes under the National Industrial Recovery Act unless they show as individuals that they dispose of their product locally and that their source of materials is of such a local character as not to affect interstate commerce in flour.

(4) Country Elevators

Country elevators as a class, customarily receive grain from local sources, but constitute the first step in putting grain from local sources into the flow of interstate commerce toward larger centers of concentration, and ultimate national or foreign sale and consumption. Their business has been held to affect interstate commerce - consequently, to be free from such local regulation as would interfere with interstate commerce.

Lemke v. Farmers Grain Co., 258 U.S. 50;  
42 S. Ct. Rep. 244; 66 Law Ed. 458 (1922).

As a consequence, they clearly do not fall within the exemption of the Executive Order of October 23rd. As a class, they remain subject to approved codes of fair competition.

(5) By "any food distributors other than retail grocers" is meant particularly those handling wheat, corn and other grain products, and particularly grain jobbers. The function performed by these persons, customarily handling grain products in the course of their flow in interstate commerce prevents them from falling within the terms of the exemption of the Order of October 23rd as local retailers or local service industries in the sense that the terms were used in the Order.

The conclusion that each of the listed classes of employers remains subject to codes of fair competition, is consistent in the case of each class with a reasonable application to them of the views expressed by the United States Supreme Court in sustaining Federal regulation of similar industries not directly engaged in interstate commerce, but whose operations have a direct effect upon interstate commerce. The conclusion is further sustained by the purpose of the National Industrial Recovery Act to coordinate and control through codes, those industries whose operations, if not directed and coordinated, would block or interfere with interstate commerce. Widespread unfair trade practices among any of the listed classes of employers would, as a matter of practical effect, obstruct the flow of grain products in the current of interstate commerce. The apparent meaning of the terms used in the Executive Order of October 23rd is to exempt retail stores in small towns which would be unduly burdened by a code, without corresponding benefit to anyone and with possible detriment to the communities they serve.

Since none of the listed classes of employers clearly falls within that definition, it cannot be said that any of them is categorically exempted. Upon a showing of the facts, it may well be that many of the individuals within each class will be exempted. It should also be noted, that while as a matter of law these several classes of employers are not exempted from application of codes of fair competition, a sound policy may dictate, that codes be not imposed on these several classes.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.

No. 26

PROHIBITION OF SHIPMENT OF LOW  
GRADE COMMODITIES

In marketing agreements or licenses under the Agricultural Adjustment Act provisions prohibiting the shipment in interstate commerce of low grades of the commodity may be justified when the economic facts show that such prohibition is not discriminatory, but such provisions cannot be upheld when they result in discrimination.

However, where the low grades do not represent merely a classification as to size, appearance, or relative quality, but are actually deleterious, such a prohibition would probably be justified although discriminatory against certain licensees on the plane of business competition.

Opinion Section Memorandum No. 52  
Dated February 2, 1934.





February 2, 1934.

MEMORANDUM TO MR. PRESSMAN

In response to your request for opinion dated January 23, 1934 based upon certain questions raised by Mr. Stevenson in his memorandum of January 18, 1934, I submit my opinion as follows:

Question Presented

Can a marketing agreement or license legally limit shipments of a given commodity by prohibiting the movement in interstate commerce of low grades of the commodity either by express prohibition, or under a volume prorate by assigning such low grades a zero ratio.

Opinion

It is my opinion that a production control scheme of this character may be justified where the economic facts show that such a prohibition is not discriminatory, but that on the other hand where it results in discrimination it cannot be legally upheld.

One specific exception to the foregoing statement should perhaps be noted at the outset. Where the low grades do not represent merely a classification as to size, appearance, or relative quality but are actually deleterious products, such a prohibition would probably be justified though on the plane of business competition it discriminated against certain licensees.

A situation is conceivable in which such a scheme would operate against all licensees equally. In the case of a commodity where all farms produced the higher and lower grades in relatively the same proportions, a prohibition against the shipments of low grades would probably be legally justified. On the other hand where the lower grades are not unhealthful and where certain farms would produce these grades exclusively or where the proportions between the production of higher and lower grades by various licensees differed widely, it seems to me that it would be difficult to justify a scheme such as that suggested.

Francis M. Shea,  
Chief of Brief and Opinion Section.



No. 27

FISCAL PRACTICE - SPECIAL FUND  
OR DEPOSIT ACCOUNTS

Receipts from the sale of inedible grease and tankage of hogs purchased under the Hog Emergency Program, after deducting the expense of the sale, must be covered into the Treasury as "Miscellaneous Receipts" and are not available, without further action by Congress, for expenditure under the Agricultural Adjustment Act.

Payments made to the trust fund provided for in Article VIII of the proposed Marketing Agreement for the Southern Rice Milling Industry may appropriately be deposited with the Treasurer in a special fund account, available to the Secretary for expenditure for the purposes specified in the Agreement.

"Parity Payments" made to the Comptroller of the Agricultural Adjustment Administration pursuant to Regulations under the Marketing Agreement for the Distilled Spirits Industry, are appropriately deposited with the Treasurer in a special fund account, available to the Secretary for expenditure for the purposes specified in the Agreement.

Opinion Section Memorandum No. 57  
Dated March 1, 1934.





March 1, 1934.

MEMORANDUM TO MR. HISS

My opinion has been requested upon the propriety of establishing, with the Treasurer of the United States, special deposit or special fund accounts for the handling of certain moneys received in the course of administration of the Agricultural Adjustment Act, and upon the availability of funds so deposited for various purposes. As the specific questions submitted involve a consideration of the general practice of the Treasury concerning such funds, together with rulings of the Comptroller's office as to such practice, a brief analysis of the principles involved will first be presented. This is to be followed by conclusions concerning three specific situations which directly involve these general principles.

OPINION

General Conclusions

1. The constitutional restrictions prohibiting withdrawal except by Congressional appropriation applies only to general funds which are in a technical sense in the Treasury.
2. Moneys "dedicated" by act of Congress to certain uses may be paid into the Treasury to the credit of special funds, available for expenditure according to the prior direction of Congress, without subsequent appropriation.
3. Similarly, moneys which, by direction of Congress, are to be expended for the benefit of certain beneficiaries, may be paid into the Treasury to the credit of trust funds, which may be expended without further appropriation.
4. Moneys received which may inure to the use of the United States, in whole or in part, according to some future determination or contingency, are properly deposited in special deposit accounts until the net amount payable into the Treasury is established.
5. Similarly, moneys received by public officers which are in the nature of private trust funds and which are not required by statute to be paid into the Treasury are properly deposited in special deposit or trust accounts.
6. Moneys held in special deposit or trust accounts may be withdrawn for the purpose of authorized

refundments; or, in the case of trust moneys, for purposes consistent with the terms upon which they were originally received.

7. The statute requiring payment into the Treasury (Section 787, 31 U.S.C.A.) applies only to moneys received "for the use of the United States".
8. However, as a matter of accounting practice, all moneys received by public officers in the course of their official duties are properly accounted for through the Treasurer.

#### Specific Conclusions

1. Receipts from the sale of inedible grease and tankage of hogs purchased under the Hog Emergency Program, after deducting the expense of the sale, must be covered into the Treasury as "Miscellaneous Receipts" and are not available, without further action by Congress, for expenditure under the Act.
2. Payments made to the trust fund provided for in Article VIII of the proposed Marketing Agreement for the Southern Rice Milling Industry may appropriately be deposited with the Treasurer in a special fund account, available to the Secretary for expenditure for the purposes specified in the Agreement.
3. "Parity payments" made to the Comptroller of the Agricultural Adjustment Administration pursuant to Regulations under the Marketing Agreement for the Distilled Spirits Industry, are appropriately deposited with the Treasurer in a special fund account, available to the Secretary for expenditure for the purposes specified in the Agreement.

#### Pertinent Section of Constitution

##### Article I. Section 9. Paragraph 7.

"No money shall be drawn from the Treasury but in consequence of appropriations made by law."

#### Pertinent Sections of Statutes

##### Title 31, U. S. C. A.

##### Section 484 (R. S. 3617).

"Deposit without deduction. The gross amount of all moneys received from whatever source for the use of the

United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever.  
....."

Section 487 (R. S. 3618).

"Proceeds of sales of material. All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of sales for which a different provision for the disposition\* of the proceeds is made, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of Government property,' and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law."

\* "deposition" should be "disposition".

Section 489.

"Payment of expenses of sales from proceeds. From the proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, before being deposited into the Treasury, either as miscellaneous receipts on account of 'proceeds of Government property' or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales, as approved by the General Accounting Office, so as to require only the net proceeds of such sales to be deposited into the Treasury, either as miscellaneous receipts or to the credit of such appropriations, as the case may be."

Section 474 (R. S. 3593).

"Public moneys subject to draft of Treasurer. All public moneys paid into any depository shall be subject to the draft of the Treasurer of the United States, drawn agreeably to appropriations made by law."

Section 49.

Forms, systems and procedure prescribed by Comptroller General.

"The Comptroller General shall prescribe the forms, systems and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States." (June 10, 1921, c. 18, § 309, 42 Stat. 25).



Title 5. U.S.C.A.

Section 549.

"Sale or exchange of animals or animal products. The Secretary of Agriculture is authorized to sell in the open market or to exchange for other livestock such animals or animal products as cease to be needed in the work of the department, and all moneys received from the sale of such animals or animal products or as a bonus in the exchange of the same shall be deposited in the Treasury of the United States as miscellaneous receipts."

Constitutional Problem Stated

The Constitution provides (Art. I, Sect. 9, Par. 7) that "No money shall be withdrawn from the treasury but in consequence of appropriations made by law." The Supreme Court has expressed the same principle in the following terms: "Moneys once in the Treasury can be withdrawn only by an appropriation by law." Knote v. United States, 95 U. S. 149 (1877). The underscoring stresses a technical but significant distinction, to-wit, that the Constitutional prohibition applies only to moneys which are, in a technical sense, in the Treasury. Money received by public officers, therefore, which can be deposited in such fashion that it does not become a part of the general fund of the Treasury, can be expended without the necessity of legislative appropriation.

Thus, the Attorney General asked whether a forfeiture deposited by a marshal to the credit of the United States in a public depository might be refunded upon the pardon of the guilty party by the President, advised that this could be done provided the deposit of the forfeiture by the marshal had not been in such form "as to constitute a complete severance from intermediate official custody and absolute entry into the Treasury of the United States." The question is "whether, by intentment of law, this money was actually in the Treasury," which point was left to the determination of the Secretary of the Treasury. 8 Op. Atty. Gen. 281 (1857).

This distinction is adverted to in U. S. v. Johnston, 124 U. S. 236, 252 (1888) in discussing the finality of a settlement for captured property made by the Secretary of the Treasury under statutes enacted after the Civil War. "The money received from captured and abandoned property was merely deposited with the Treasurer and was not technically, in departmental language, covered 'into the Treasury', and so according to the construction then given by the Department, was not subject to the constitutional provision that 'no money shall be drawn from the Treasury but in consequence of appropriations made by law'". This construction the Court refused to overturn.



Character of Treasury Funds and Deposits.

(a) General Fund.

Moneys which are revenues of the United States, received for its use, "except where otherwise provided by law, are covered into and constitute the general fund of the Treasury, and are available for appropriation by Congress." 14 Comp. Dec. 361, 364 (1907).

The policy of requiring the gross amount of all money "received for the use of the United States" to be paid into the Treasury, a policy embodied in Rev. Stat. 3617 (31 U.S.C.A. Sect. 484, supra), is one of long standing and of binding force in the interpretation of doubtful statutes.

Thus, in construing amendments relating to the disposition of penalties collected for depredations to public timber lands, the Attorney General stated: (17 Op. Atty. Gen. 592, 593 (1883))

"Since the year 1831, when the provisions of Section 4751 were first enacted, it has become the general policy of the United States to require that all moneys collected in behalf of the United States shall be paid into the Treasury (Rev. Stats. Sec. 3617). Some exceptions thereto, not depending upon any special reason, which here and there had escaped attention, are gradually disappearing. I regard the provisions of the above act of 1878 merely as putting an end to one of these exceptions."

In 10 Comp. Gen. 382, 383 (1931) this requirement was described as being

"nothing more than in furtherance of the provisions of the Constitution, Article I, section 9, paragraph 7, that 'No money shall be drawn from the Treasury but in consequence of appropriations made by law'. Indeed the intent can reasonably be said to appear that all the public moneys shall go into the Treasury; appropriations then follow."

This broad statement is subject to qualification since, as will be seen, there may be public moneys which are never subject to the requirement of being paid into the Treasury. And, in addition, there are public moneys subject to such a requirement which may nevertheless be expended without subsequent appropriation.

(b) Special Funds Created under Statutory Authority.

These are funds to which are credited moneys received from specified sources which, by authority of Congress, are to be expended for cer-

tain purposes. See 14 Comp. Dec. 361, at 364; and see Annual Report of Secretary of Treasury (1932), 338-339, Description of Fund Accounts Through Which Treasury Operations are Effected.

One example is found in the statute providing that money received from the sale of products of the forest reserves shall be covered into the Treasury and constitute a special fund available for expenditure by the Secretary of Agriculture for certain purposes. 33 Stat. 628. This action by Congress was characterized by the Comptroller as in effect an appropriation of the funds for the stated purposes, although not an appropriation in the constitutional and strict sense, which can be made only from the general fund. 38 M. S. Comp. Dec. 893, 897.

A similar provision is that relating to duties collected upon imports from the Philippines, which "shall not be covered into the general fund of the Treasury of the United States, but shall be held as a separate fund and paid into the Treasury of the Philippine Islands, to be used and expended for the government and benefit of said islands." 32 Stat. 54. Such moneys, held in a special fund, "having been dedicated by Congress for expenditure for specified objects before they were covered into the Treasury, in which they have been placed for safekeeping only, are subject to withdrawal from the Treasury for expenditure for those objects without appropriation." 14 Comp. Dec. at 364.

A statute may provide that certain receipts shall be used for certain purposes but not specify that they be held in a special or separate fund. The presence of statutory authorization as to their use is sufficient to set them apart as a special fund, to be covered into the Treasury as such. See 13 Compt. Dec. 700 (1907), where proceeds from the sale of certain lots were required by statute to be expended for local improvements. Since the proceeds are factually in a special fund, and Congress has authorized their expenditure for a particular purpose, no technical appropriation is necessary. Ibid. at 703.

(c) Trust Funds Created under Statutory Authority.

Three examples of this type of fund are here listed:

(1) Moneys received by the Secretary of State from foreign governments and other sources in trust for citizens of the United States, which are to be "deposited and covered into the Treasury". 29 Stat. 32. Here the trust moneys are received direct from donors.

(2) Net proceeds of sales of the land ceded to the United States by the Chippewa Indians, which "shall be placed in the Treasury to the credit of said Indians as a perpetual fund". 25 Stat. 645. Here the moneys are collected as revenues of the United States impressed with a trust.

(3) The Secretary of the Treasury is directed to set up, out of any moneys not otherwise appropriated, a certain sum to hold as a perpetual trust fund for the Ute Indians. 21 Stat. 204. Here the moneys are appropriated from the general fund.

As stated in 14 Comp. Dec. at 366:

"Moneys in trust funds are not properly available for expenditures of the Government. They are payable to or for the use of the beneficiaries only. The beneficiaries may be either a single person or a class of persons."

Where the statute does not specify the character of the fund as a trust or special fund, there may be some difficulty in distinguishing between the two. The one is stated to be available only for the use of the beneficiaries, the other for public expenditures. For instance, in the case of the duties paid on Philippine imports which were to be held as a separate fund and then paid into the Treasury of the Islands "to be used and expended for the government and benefit of said Islands", the Comptroller was impressed by the fact that the sole reason for holding them in a fund in the Treasury was to accomplish a determination of the net amount payable, before paying over to the Philippine Treasury. He accordingly concluded:

"I do not think it was the intension of this legislation to establish, as to these moneys, the relation of trustee and beneficiary between the United States and the government of the Philippine Islands, but merely to apply these particular net revenues to defraying a portion of the cost of governing those Islands." 14 Comp. Dec. at 367.

#### General Practice as to Special Deposit Accounts, Special and Trust Funds.

In addition to particular funds established by statute as special or trust funds, the use of special deposit accounts for handling moneys received by public officers is a matter of confirmed practice. Such accounts include both public moneys and moneys of a private character obtained and held for some particular purpose sanctioned by law.

##### (a) Receipts Subject to Refundment.

One large class of such receipts consists of deposits or payments which, though required by law, are subject to refundment in certain contingencies and therefore may not inure finally to the use of the United States. In discussing the public character of such moneys, the Supreme Court, in a case involving payments required by the Land Office to be made by entrymen at the time of submitting their proofs for a land patent, said: (Smith v. U. S., 170 U. S. 372, 379 (1898) )



"What difference does it make that the Government comes under an obligation to repay the money to the men in case the proofs are not finally accepted? The money is none the less public money when paid to this public official pursuant to law and under the direction and by reason of the regulations of the Land Office .....

"As the party taking the money is a public officer, and as he exacts the payment, and such exaction is in pursuance of a regulation of the General Land Office, it seems to us that the money thus paid is received by the receiver as public money, and he is neither in law or in fact the agent of the entrymen. If the proofs are unsatisfactory, and the money is returned, it is returned by the receiver as a public officer and as the agent of the Government."

When, however, a statute governing collections is so strict and comprehensive that even payments of such a conditional nature must be paid "into the treasury", appropriations may be required to authorize the necessary refunds. Such a situation has been remedied by the passage of legislation to authorize carrying such payments in a special deposit account of the collector. See 4 Comp. Gen. 717, 719 (1925). (Legislation relating to sums offered in compromise, etc. paid to internal revenue collectors).

Where there is no statutory barrier, the use of special deposit accounts for refund purposes is advised as a matter of proper accounting. Thus, in regard to checks received by the disbursing officer of the Department of the Interior, which include deposits for the grant of certain privileges in the National Parks, the Comptroller, after stating that these should be deposited in the officer's official account with the Treasurer stated: (19 Comp. Dec. 444 (1913):

"Such of the receipts so deposited as are not involved in refundments should then forthwith be withdrawn by the disbursing clerk's check for deposit to the credit of the Treasurer of the United States, indicating the proper account to which the receipt belongs. Such of the receipts so deposited as may involve refundments should be taken up by the disbursing clerk in his official account rendered the auditor as a special deposit account, indicating thereon the character of the receipt."

In extension of this practice, the Comptroller has on various occasions directed the use of general forms of special deposit accounts to cover different types of money receipts by collecting officers which are subject to refundments. For example, Army officers are permitted by statute to ship excess baggage together with an allowed amount, reimbursement to be collected for the charges on the excess. To make the statute effective, the Secretary of War by regulation required officers to make



an advance deposit for such purpose, any overdeposit to be refunded. On inquiry as to the propriety of setting up a special deposit account for these advance deposits, the Secretary was advised (20 Comp. Dec. 479, 1914) that:

"..... a general form of special deposit account current should be provided and used by all disbursing and collecting officers of your department who collect moneys, the correct amount of which has not been determined at the time of receipt and refundment is involved, or which, for any reason, must be held until their nature and place in the officer's regular account have been determined."

Advice to a like effect was given in 21 Comp. Dec. 375 (1914), stating that the special deposit account of the collector for the Panama Canal

".....should embrace all moneys received by him, actually or constructively, acting in his official capacity as collector of the Panama Canal, which at the time of receipt cannot be taken up into his regular account because subject to refundment, or because they are in whole or in part in the nature of trust funds, or because of other good and sufficient reasons."

The distinction between receipts which may be handled through special deposit and special fund accounts and those which are required to be covered into the Treasury as miscellaneous receipts is well illustrated in 3 Comp. Gen. 612 (1924). Under the Immigration Act provision is made for various administrative fines and for the deposit of passage money to be given to the alien or returned to the steamship company, after a determination of the alien's admissibility. Where deportable aliens escape, these deposit moneys, which in the event of non-payment to the steamship line, are payable only to the alien and his heirs, sometimes accumulate unclaimed. It was advised that such deposits be carried in special deposit accounts for a six months' period and then be deposited in a special fund account which should be maintained at a certain figure; any excess over that figure was to be covered into miscellaneous receipts. The Comptroller at the same time, however, disapproved a proposal for a special fund account to be used to refund immigration fines actually imposed and paid when, upon the basis of new evidence, it should appear that there had been no actual violation. The fines once paid had by prior practice been covered into the Treasury, and Congress had regularly provided by appropriation for refundments when necessary. This, in the opinion of the Comptroller

"in effect would be a revolving fund, being obviously improper and unauthorized."

The principle followed in these cases is that as soon as specific moneys received are determined to belong to the United States, they must be covered into the general fund in the Treasury, subject to appropriation by Congress. Prior to that time they may be handled in special deposit or fund accounts, but all receipts which come into the hands of a disbursing officer by virtue of his official position must be accounted for through his official account with the Treasurer. 19 Comp. Dec. 442 (1913) (deposits for privileges in national parks).

(b) Moneys not Received for the Use of the United States.

It will be noted in the decisions cited above that some of the moneys to be handled through special deposit accounts included moneys, such as the deposit money for officers' baggage or for aliens' steamship passage, which are not received "for the use of the United States". One decision (21 Comp. Dec. 374, *supra*) speaks specifically of such moneys as "in the nature of trust funds". Where the duties of the officer toward such moneys are purely custodial, such deposit accounts may be called special accounts or trust accounts, without any difference in legal consequence.

Money received by the disbursing clerk in the Department of the Interior for Geological Survey maps which were returned undelivered by the Post Office furnishes an example. It was advised that such money carried on the special deposit account of the disbursing officer should, after due attempt to locate the persons entitled, be "deposited into the Treasury and placed to the credit of a special fund to be established on the books of the Treasury." 8 Comp. Gen. 280 (1928). When a Navy pay inspector is permitted to accept deposits from midshipmen, these should be accounted for to the Treasurer as a "trust fund". 14 Comp. Gen. 827 (1908).

When moneys received by a public officer are not "public moneys" they do not come within any statutory requirement of deposit in the Treasury or with the Treasurer. Thus no legal objection was seen to permitting a finance officer of the Army, station in Paris, to deposit in a bank in Paris on a special deposit account moneys contributed by private individuals for decorating the graves of American soldiers. 5 Comp. Gen. 428 (1925). A monthly accounting, however, was advised on the ground that the interests of the government require that

".....all moneys received by Government officers as such be accounted for to the General Accounting Office, irrespective of whether they be strictly public moneys or moneys of a private character obtained and held for some particular purpose sanctioned by law."

See also 14 Comp. Dec. at 828 to the effect that "any disbursing officer receiving money in his official capacity should be held to as strict accountability for such money as for funds advanced to him from the Treasury."

In the case of the general railroad contingent fund provided for in the Interstate Commerce Act, built up from compulsory payments of amounts earned in excess of the permitted six percent, the Attorney General has advised that these moneys need not be deposited in the Treasury but may be deposited in such banks or trust companies as are designated depositories for government funds. Although aided to this result by special provisions in the statute, the opinion does state a conclusion that the fund was not created for the use of the United States and was for that reason not within the provisions of Section 3617 requiring the deposit in the Treasury of the gross amount of all moneys received for the use of the United States. 33 Op. Atty. Gen. 316 (1922).

Similarly, the proceeds from the sale of a captured vessel, which were held by a federal marshal awaiting the order of a court, is not public money within the meaning of this requirement, nor, upon deposit by the marshal in a bank which is a depository for public funds, do they become public moneys for which the United States is responsible. See Coudert v. U. S., 175 U. S. 178, 183 (1899).

".....the public moneys of the United States are the revenues of the United States from all sources, and the gross amount received must first be paid into the Treasury..... They are then subject to the draft of the Treasurer of the United States drawn agreeably to appropriations made by law."

See also U. S. v. Mason, 218 U.S./<sup>517</sup>(1910) (fees received by clerk of court from which his salary and expenses are to be deducted not "public money" even though, after final audit of accounts, any surplus is to be paid into the Treasury).

#### General Conclusions

1. The constitutional restriction prohibiting withdrawal except by Congressional appropriation applies only to general funds which are in a technical sense in the Treasury.
2. Moneys "dedicated" by act of Congress to certain uses may be paid into the Treasury to the credit of special funds, available for expenditure according to the prior direction of Congress, without subsequent appropriation.
3. Similarly, moneys which, by direction of Congress, are to be expended for the benefit of certain beneficiaries, may be paid into the Treasury to the credit of trust funds, which may be expended without further appropriation.



4. Moneys received which may inure to the use of the United States, in whole or in part, according to some future determination or contingency, are properly deposited in special deposit accounts until the net amount payable into the Treasury is established.
5. Similarly, moneys received by public officers which are in the nature of private trust funds and which are not required by statute to be paid into the Treasury are properly deposited in special deposit or trust accounts.
6. Moneys held in special deposit or trust accounts may be withdrawn for the purpose of authorized refundments or, in the case of trust moneys, for purposes consistent with the terms upon which they were originally received.
7. The statute requiring payment into the Treasury (Section 787, 31 U.S.C.A.) applies only to money received "for the use of the United States".
8. However, as a matter of accounting practice, all moneys received by public officers in the course of their official duties are properly accounted for through the Treasurer.



I.

Receipts from the sale of inedible grease and tankage from hogs purchased under the Emergency Hog Program must be covered into the Treasury as "miscellaneous receipts" and, when so deposited, are not available for expenditure by the Secretary of Agriculture.

The agreements entered into with the packers on August 22, 1933 under the Emergency Hog Program provided for the purchase of hogs by the packers "for the account of and on behalf of the Secretary of Agriculture." These hogs were purchased with moneys appropriated under the Agricultural Adjustment Act, and the agreements set forth arrangements for the processing and disposition of the resultant products.

In the purchase and disposition of these animals the Secretary was exercising a power granted him by the Act to relieve the market of burdensome surpluses under a condition of declared "economic emergency". The hogs were purchased under terms by which they became public property, and the inedible grease and tankage were subsequently disposed of by awards upon public bidding. The problem is whether the proceeds from these sales are available for expenditure at the discretion of the Secretary or whether they must be paid into the Treasury.

Section 487, 31 U.S.C.A., which requires that the proceeds of the sale of public property shall be paid into the treasury, is a statutory provision of a general nature. It does not apply to the sale of property held in trust for others. U. S. v. Sinnott, 26 Fed. 84 (1886). But it does apply to "all proceeds of sales of old material, condemned stores, supplies, or other public property of any kind," save for certain specified exceptions. Possibly further exceptions might be admitted where essential to the accomplishment of a particular transaction in performance of a statutory duty. There is, however, no such necessity in the present case. The disposition of the money received has no direct relation to the accomplishment of any purpose under the Act. The net effect of holding the money in a special fund available for expenditure by the Secretary would merely be to increase the appropriation originally made by the Act. That it was the object of Section 487 to avoid this result in all situations is indicated by the explicit provision that all receipts from the sale of public property shall be "covered into the Treasury as miscellaneous receipts, on account of 'proceeds of government property', and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law." No reason is perceived, therefore, why the handling of these moneys should differ in any manner from that applicable to all other receipts from the sale of government property.

Only the net proceeds of the sale, however, are required to be paid into the treasury, since Section 489 provides that the expense of the sales, as approved by the General Accounting Office may be paid

from the proceeds. Since the proceeds are subject to this deduction, their deposit in a special deposit account, pending the determination of the net amount has been allowed by the Treasury. See 19 Comp. Dec. 442; 20 Comp. Dec. 479; 21 Comp. Dec. 374; 4 Comp. Gen. 717.

In connection with future purchases of surplus commodities, it would seem to violate the principle of Section 487 to stipulate by contract that any part of the proceeds from the sale of such commodities be used for any determinate purpose. In the lease of the Teapot Dome oil reserves it was provided that royalty oil be exchanged for fuel oil and storage facilities, and the lease was held in this respect to be "inconsistent with the principle upon which rests the law requiring purchase money received on the sale of government property to be paid into the Treasury." Mammoth Oil Co. v. U. S., 275, U. S. 13 (1927).

It is true that Section 549, 5 U.S.C.A., provides that the Secretary may sell or "exchange for other livestock such animals or animal products as cease to be needed in the work of the department." Such authority to exchange would cover so small a field that it could be only of slight practical benefit in the administration of the emergency program. Furthermore, this provision probably cannot be considered applicable to operations under the Agricultural Adjustment Act.

The only way, therefore, by which authority could be conferred upon the Secretary to use the proceeds from the sale of surplus commodities for the general purposes of the Act would appear to be by specific amendment of Section 12 (b).

II.

Payments made to the Disbursing Agent of the Department of Agriculture under Article VIII of the proposed New Marketing Agreement for the Southern Rice Milling Industry, may properly be deposited with the Treasurer as a trust fund and expended as provided by the terms of the Agreement.

By the terms of the proposed Agreement, the millers agree to establish a "trust fund". In purchasing rice from producers, the millers undertake to make two payments, one to the producer, and one, amounting to two-thirds of the payment to the producer, to the Secretary. These payments are to be made to the order of "Disbursing Agent, United States Department of Agriculture". The money so received by the Secretary is to be held by him as a "trust fund". This fund is to be used to pay to producers cooperating in a crop reduction program "a sum not exceeding the total sum paid to the Secretary during said crop year.....on rough rice purchased from said Producer less his proportionate share of the expenses incurred." The expenses of administering this crop reduction program are to be paid from this fund, and any balance remaining in the fund at the end of any crop year shall be "used and/or distributed as the Secretary shall determine to effectuate the purposes of the Act."

In entering into the proposed Agreement the Secretary is exercising a power conferred upon him by Section 8 (2) of the Agricultural Adjustment Act. This power is to be exercised to effectuate the declared policy of the Act, which calls for the balancing of production and consumption, and recognizes the reduction of production as a necessary means thereto. The power given to the Secretary to enter into Agreements to effectuate this policy necessarily carries with it authority to negotiate with the other contracting parties terms calculated to insure effective operation.

The action of the Secretary in entering into contractual arrangements under statutory authority is not subject to the approval of the Comptroller General. Opinion to this effect was rendered by the Attorney General in advising upon the effect of a regulation promulgated by the Comptroller prescribing a form of bill of lading which contained an entirely new provision, 36 Op. Atty. Gen. 289 (1930). The Attorney General stated:

"In its use for the purpose of 'administrative appropriation and fund accounting in the several departments and establishments' of the Government, the form of bill of lading, after its contractual terms and conditions have been agreed upon, is, by virtue of sec. 309 of the Budget and Accounting Act, subject to the approval of the Comptroller General as a form for accounting purposes; but such approval can not in any way extend to contractual



obligations, which the parties are entitled freely to negotiate without dictation from the Comptroller General, whose function is that of an accounting officer." (p. 294).

The regulation was deemed to be "in effect an attempt to limit the authority of the Secretary of War, expressly granted by Act of Congress, and therefore, to this extent at least, is invalid."

The payments made by the parties to the Marketing Agreement are made pursuant to an agreement as to the substance of which, therefore, the Comptroller has no authority. It is provided by the Agreement that the payments shall be made to the order of "Disbursing Agent, United States Department of Agriculture." Undoubtedly private individuals cannot, by agreement, compel the acceptance by public officers of funds of any character. Nor is it within the jurisdiction of the Comptroller to grant authority to a departmental disbursing officer to accept deposits, that being a matter within the discretion of the head of the department. 14 Comp. Dec. 827 (1908). Authority having been granted, however, by such officer, the Comptroller has maintained that it is within his jurisdiction to prescribe the method of accounting, even though the moneys are not received "for the use of the United States." Ibid. at 828.

The proper deposit of the moneys received by the disbursing officer depends upon whether they are or are not received for the use of the United States. If received wholly for such use, and subject to no refundment, they must, according to Rev. Stat. 3617 (Sect. 484, 31 U.S.C.A.) be paid into the Treasury and, becoming then a part of the general funds, may not be withdrawn except by appropriation.

However, it appears obvious that the moneys payable under the proposed Agreement would not be moneys "for the use of the United States". Since the legal obligation to pay is founded upon the Agreement, the moneys received are subject to whatever restrictions are imposed by the Agreement upon their use, and the trust character of these funds is inescapably impressed upon them by the language of the Agreement. (1) The millers agree to establish a "trust fund". Art. VIII, Sec. I. (2) "All payments to the Secretary.....shall be held as a trust fund for the purposes and uses herein set forth." (3) The disposal of the entire fund is provided for. Art. VIII, Sec. 6. Any balance remaining after the prescribed payments are made to cooperating producers and the payment of expenses, is to be used "as the Secretary shall determine to effectuate the purposes of the Act". That these purposes correspond to the purposes for which he is authorized to expend public moneys appropriated by Congress under the Act, does not alter the fact that, as <sup>to</sup> this fund, he is acting solely as a trustee bound by the terms of the trust agreement. The reference to the purposes of the Act is merely descriptive of the purposes for which the trust funds may be expended and gives no added legal force to the arrangement.



Such being the character of the authority under which the money is received and held, the money is not "for the use of the United States", and therefore cannot properly be paid "into the Treasury" as a part of the general funds available for appropriation by Congress. For the same reason, it cannot properly be held in a regular account. See 23 Comp. Dec. 435 (1917).

As money received by a public officer in the course of his official duties and under authority of law, such funds may, however, be properly deposited with the Treasurer as special or trust funds. 14 Comp. Treas. 827 (1908); 20 Comp. Dec. 479 (1914); 3 Comp. Gen. 612 (1924) 8 Comp. Gen. 280 (1928). As indicated above, it is of relatively minor importance whether the account be called a special or trust fund account, since either designation cannot alter the conditions upon which the money is received. The provision of the Agreement that it shall be held as a "trust fund", and the fact that extensive duties of administration accompany the acceptance of the payments seems to point to the propriety of designating it as a Trust Fund in the Treasury records.

In any case the disbursement of the fund so deposited must be governed by the terms of the Agreement, and rules which govern expenditure from general Treasury funds are not controlling. "The same limitations in making payments out of the trust fund of the expenses incurred in the administration of a trust assumed by the United States do not apply, as do apply to payment made from public moneys or out of the Treasury under appropriations made by law." 14 Comp. Dec. 921 (1908) citing U. S. v. Brindle, 110 U.S. 688, 694.

It is our conclusion that the moneys paid to the Secretary under the proposed Agreement may properly be deposited with the Treasurer as a trust fund and, upon being so deposited, may be withdrawn for expenditure in accordance with the terms of the Agreement. As to the extent of the Comptroller's authority to direct the form of accounting of moneys which are not public moneys, no opinion is expressed. See 34 Op. Atty. Gen. 217 (1924). The authority of the Comptroller cannot be regarded as extending to control over the terms of the Marketing Agreement entered into by the Secretary, or the acceptance by the Secretary of the payments made pursuant thereto, or the purposes for which the fund may be expended, since these are governed by the terms of the Agreement.

III.

"Parity payments" made to the Comptroller of the Agricultural Adjustment Administration pursuant to Regulations under the Marketing Agreement for the Distilled Spirits Industry, are appropriately deposited with the Treasurer as a special fund, available to the Secretary for expenditure for the purposes specified in the Agreement.

By the terms of this Agreement the ~~millers~~<sup>distillers</sup> agree to pay for cereal grain and products thereof not less than the "fair exchange value", which amount is to be promulgated from time to time by the Secretary. Section 3 provides that

"Whenever the sum of (1) the current average farm price for any cereal grain or product thereof used by contracting distillers, plus (2) the processing or other tax under the Act, if any, paid with respect thereto or with respect to a commodity from which processed or derived directly or indirectly, is less than the fair exchange value for such grain or product, the contracting distillers shall pay the amount of such difference (hereinafter known as the parity payment) into the Treasury of the United States or such other depository as may be designated by regulations of the Secretary."

4 Payments are to be made according to regulations made by the Secretary. Section 4 furthermore specifies:

"Such amounts shall be utilized for rental or benefit payments or other disbursements under the Act made with respect to grain."

The question as to how these payments shall, upon receipt, be handled and accounted for turns upon whether they are or are not moneys received "for the use of the United States." If they are, they must, under Section 3617 Rev. Stat. (Sect. 484, 31 U.S.C.A.), be covered into the Treasury and cannot be expended without appropriation. If not, they may be handled as special or trust funds.

As in the case of the proposed Marketing Agreement for the Southern Rice Milling Industry, there is, apart from the contract, no legal obligation upon the parties to make the payments. Nor can the payments be regarded in any sense as gifts in the nature of voluntary contributions to public expenditures, since the transaction is an executory one involving mutual obligations. See 30 Atty. Gen. 527 (1916). The Agreement does not specify that the parity payments shall constitute a trust fund nor does it provide for payments from the fund, when constituted, to a determinable class of producers, When the Agreement says

that "such amounts shall be utilized for rental or benefit payments or other disbursements under the Act made with respect to grain," the phrase "rental or benefit payments or other disbursements under the Act" is merely descriptive of the purposes to which the parity payments are to be applied under the contract. This provision does not place the payments within the class of moneys received "for the use of the United States" and therefore subject to the provisions of Section 484, 31 U.S.C.A.

The Agreement itself makes no attempt to prescribe a complete procedure for handling the payments. Section 3 states that they shall be paid "into the Treasury of the United States or such other depository as may be designated by regulations of the Secretary." This, however, is not a specification that they shall be covered into the Treasury without being distinguished from other funds, the effect of which would be to make them unavailable for expenditure except by appropriation of Congress. Were such a procedure required, the Agreement would become impossible of accomplishment. On the contrary, the Agreement gives the Secretary wide discretion as to the method of handling such funds. Section 4 provides that he may prescribe the manner of payment, and Section 3 provides that the payments shall be paid "into the Treasury of the United States or such other depository as may be designated by regulations of the Secretary." Obviously, what is contemplated is a payment or deposit upon terms consistent with the conditions upon which the payments are made and with their subsequent availability for disbursement for the purposes specified. Such disbursements are not strictly "under the Act" but are disbursements of funds which come into the hands of the Secretary pursuant to the terms of the contract. The authority to enter into the contract is derived from the Act, but the authority and duty to make the expenditures provided for rest upon the Agreement.

As the parity payments are not received "for the use of the United States" but for purposes specified by the Agreement, they are subject to the same principles which apply to the trust fund provided for in the proposed Agreement for the Southern Rice Milling Industry and should be handled as a special or trust fund account with the Treasury, as the accounting officers of the Government may direct.

Francis M. Shea,  
Chief of Brief and Opinion Section  
Office of the General Counsel.





No. 28

SALARY OF MARKET ADMINISTRATOR

UNDER MILK LICENSES

In a license to milk distributors issued under Section 8(3) of the Agricultural Adjustment Act there is no objection to a provision that the salary of a market administrator appointed by the Secretary be paid from payments made by the licensees in a manner prescribed by the license, since such payments are not in the nature of voluntary contributions prohibited by Section 26, 5 U.S.C.A.

Opinion Section Memorandum No. 44  
Dated March 8, 1934.

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March 8, 1934.

MEMORANDUM TO MR. PRESSMAN

I herewith submit my opinion upon the following:

QUESTION

Is it permissible in a License issued under Section 8 (3) to provide that the salary of a Market Administrator appointed by the Secretary be paid from payments made by the Licensees in the manner prescribed by the License?

OPINION

Although the Administrator, under the terms of the proposed Model Milk License, is an officer of the United States, there is no legal objection to the payment of his salary in the manner proposed, since the payments required from the licensees are compulsory and made pursuant to law and are not in the nature of voluntary contributions.

PERTINENT PROVISIONS OF THE LICENSE

Appointment and Compensation of the Administrator.

The License, in its present form, provides that the Secretary "shall designate the Market Administrator who shall perform such duties as may be provided for him in the License." The Administrator, before entering upon his duties, is required to give bond satisfactory to the Secretary conditioned upon the faithful performance of his duties. He is entitled to "reasonable compensation", the amount of which shall be determined by the Secretary, and is subject to removal by the Secretary at any time.

Duties and Powers of the Administrator.

These include:

- (1) Fixing the amount (over a stated minimum) of the bond required of distributors, and waiving the requirement under certain conditions.
- (2) Receiving reports from distributors on milk purchased and sold, and computing the blended price payable to producers by distributors, in some cases classifying milk and cream according to special use.

- (3) Maintaining adjustment accounts for distributors; checking the sampling, weighing, and butterfat tests and directing settlements in cases of discrepancy.
- (4) Receiving and keeping separate accounts of payments received from distributors (1) to be retained by the Administrator to meet his "cost of operation" and (2) to secure certain services to producers.
- (5) Incurring expenses, including the compensation of persons necessary for the proper conduct of his duties.

#### Cost of Operation.

Distributors are required to deduct a certain amount from payments to producers for milk purchased and pay the amount deducted to the Administrator. The payments so required are to be used to cover the Administrator's total cost of operation, including, apparently, his own salary. Until the first of such payments is received he is authorized to borrow to meet his operating costs.

#### OPINION

(1)

The Administrator, under the terms of the License providing for his appointment and duties, is an officer of the United States.

The status of the Administrator under the proposed plan conforms in all respects to the usual tests by which public officers are distinguished from those whose employment, although authorized by law, does not constitute a position of "public office."

The Administrator is to be appointed by the Secretary, authority for such appointment being provided by Section 10(a) of the Act. His appointment, being made by the head of a department under express statutory authority, conforms to one of the methods provided by the Constitution for the appointment of an inferior officer. Const., Art. II, Section 2.

His employment, although not for a fixed term, is of a continuing nature, not limited by contract. This, in addition to the method of his appointment, is evidence that he is a public officer. An "office" is said to embrace "the ideas of tenure, duration, emolument, and duties." U. S. v. Hartwell, 6 Wall. 385 (1867).

However,

"By tenure is not meant a holding for a fixed term. Many admitted officers do not so hold. The distinction is between those persons whose services are occasional and temporary, fixed by some contract of employment, and those whose services are



general and indefinite in a line of duty prescribed by law." 29 Atty. Gen. 593, 596 (1912). See also U. S. v. Germaine, 99 U. S. 508, 511 (1878); Auffmordt v. Hedden, 137 U. S. 310, 322 (1890).

The duties of the Administrator are "in a line of duty prescribed by law", since they are fixed by the terms of the License itself. The fact that his duties are so prescribed impresses them with a public character, and the fact that he is directly responsible for their performance leads to the conclusion that his status is that of an officer rather than that of a mere employee of the government.

"Where the appointment, therefore, is made in one of the ways by which, under the Constitution, an officer may be appointed, the inquiry must always be into the nature of the services to be rendered. If the appointee himself performs any of the functions of government, he is an officer. If he merely renders assistance to another in the performance of these functions, he is an employee" 31 Op. Atty. Gen. 201, 203, (1918).

The fact that the License provides that the Administrator may be "removed" by the Secretary is a further indication that the Administrator is an officer and not merely an employee. The effect of removal is to leave a vacancy, which may be filled by new appointment. The duties prescribed by the License attach to the position and are not in the nature of obligations personal to the appointee. Thus the Administrator falls within Justice Marshall's definition of a public officer (U. S. v. Maurice, 2 Brock. 96, 102-3 (1823) ):-

"A man may certainly be employed under a contract, express or implied, to do an act or to perform a service without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

(2)

The salary of the Administrator, as an officer of the United States, must be paid wholly from public funds.

Section 66, 5 U. S. C. A. provides:

"No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States--"

and furthermore:

"--no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any government official or employee for the services performed by him for the Government of the United States."

To this an exception is provided in the case of officials and employees of the Department of Agriculture engaged in activities "involving cooperation" with certain local agencies. Sects. 563, 564, 5 U. S. C. A. In view of our conclusion that the Administrator, under the License, does not receive salary from any source other than the Government, it is unnecessary to consider this exception from the declared policy.

(3)

The Administrator's salary is so paid.

The propriety of paying the Administrator in the manner proposed by the License turns on whether such payment is "from any source other than the Government of the United States" within the meaning of the statute. It should be noted that the statute is a penal one, carrying penalties which apply to those making as well as those receiving improper contributions.

The statute must be interpreted in the light of its purpose, which has been said to be "that no government official should serve two masters to the prejudice of his unbiased devotion to the interests of the United States." 33 Op. Atty. Gen. 272, 275 (1922). Accordingly, an arrangement by which business organizations were to pay the expenses of officers of the Department of Commerce to address them upon the business of the Department was considered not improper where there was assurance that the payment was not to benefit the officers personally, either directly, or indirectly, by making possible the payment of higher salaries. Ibid. On the other hand, the employment at a salary of \$1 per year of a trade association secretary as a field representative of

the Geological Survey to collect certain reports was disapproved on the ground that the salary received from the association would be, to some extent at least, in connection with the services to be performed for the Government. 31 Op. Atty. Gen. 470 (1919).

The statute undoubtedly applies when the contributions are of a voluntary character made by private parties prompted by their own interests, which may or may not be of a nature consistent with the public welfare. If the salary is paid by a corporation, such as the Emergency Fleet Corporation, which is "in a substantial sense a government agency," the objection does not apply. See U. S. v. Morse, 292 Fed. 273, 277 (1922). A different question also is presented when the payments are made by private parties, but involuntarily, under compulsion of law.

Most of the money expended by the Government is collected in the first instance from private parties; and the essential point of inquiry in determining whether receipts are "contributions" within the meaning of the statute is therefore the basis upon which the payment is made. In the present case payment is made upon the compulsion of a license having the force of law and not upon the voluntary act of the distributors. It is impossible to regard such payments, made under the compulsion of public authority, as "contributions" within the meaning of a statute providing criminal penalties for both makers and recipients. The "source" of the salary derived from such payments is the Government of the United States, in every essential sense, quite as much as would be the case if the payments required were made to some other public official and then applied to the payment of the Administrator's salary and to the other purposes specified.

In determining whether a deputy clerk of a district court is a public officer, the Attorney General has said that the fees collected by the clerk and used to defray the compensation of the deputy clerk and other expenses are "public funds." 29 Op. Atty. Gen. 593 (1912). It is pointed out in the opinion that the money to pay the deputy comes from fees charged by the clerk for performing services required by law, which fees are accounted for to public officials and the surplus of which must be accounted for to the Treasury.

A case which should be distinguished is International Railway Co. v. Davidson, 257 U. S. 505 (1922). In this a collector, acting under Treasury instructions, required the owner of a toll bridge over the Niagara River to take out a license and to agree to pay the amount of certain extra compensation for custom inspection service on Sundays and holidays. In granting an injunction the court said: (p. 514)

"To collect the cost of customs service from vessel owners or others is virtually laying a tax on them. This cannot be done except by specific authorization of Congress. Moreover, unless so authorized, no official or employee may receive from the Government pay for extra services.....Nor may he receive in connection with his services pay from any private source..."



In this case the vice of the contemplated collections was that the Secretary of the Treasury assumed to act under a statute which applied to the unloading of vessels, but not to bridge traffic, and therefore acted without authority. That the decision has no direct application to payments made to a public officer pursuant to lawful requirement is shown by Port Huron & Sarnia Ferry Co. v. Lawson, 292 Fed. 216 (E.D.Mich. S.D. 1923), in which the court, having determined that the statute did apply to boats operating between Canada and the United States, rejected as "without merit" the contention that the statute in effect imposed a tax upon vessel owners for a private purpose. After stating that the statute imposed no direct tax but merely an excise tax for the privilege of unloading, the court stated: (p.220)

"Under the terms of the statute, the compensation for such overtime services is not paid by the licensee to such officers or employees, but to the collector of customs, who pays the extra compensation, which has been fixed by the Secretary of the Treasury, to those entitled thereto, according to the rate so fixed. In substance and essence the recipient of the special license so granted indemnifies and reimburses the government for the additional liability and expense incurred by it by reason of the extra cost of granting this special license. The customs officials performing the overtime services required are employed by, and look for payment of their compensation to, the government, which, in turn, is thus reimbursed and saved harmless by the licensee. This does not render the purpose of the payment a private benefit, and Congress is well within its constitutional powers in making provision for such a transaction."

Under the License as proposed, the payments are not paid to a collecting officer and by him paid over to compensate other officials and employees for the performance of public duties. They are to be paid direct to the Administrator. The distinction is one of form rather than of substance and does not alter the essential character of the payments made. It results merely from the fact that, for purposes of convenient administration, the Administrator is charged with the double duty of receiving as well as disbursing funds from which his salary as well as other expenses are to be met.

Assuming that the payments from licensees are lawfully required under the Act, it is our opinion that those are not payments "from any private source" so as to bring them within the condemnation of the statute, that they do not constitute "contributions" on the part of the licensees, and that the Administrator in receiving compensation, according to the terms of the License, from payments so required is not receiving salary "from any source other than the Government of the United States."



So long as the License remains effective, the compulsory character of these payments cannot be altered by the fact that certain of the licensees may have bound themselves also by agreement to pay the required sums. The question of the propriety of such payments, resting upon a Marketing Agreement alone, is not presented.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.



No. 29

CONSTRUCTION OF SUPERFLUOUS WORD  
IN MILK LICENSE

The superfluous word "not", inserted in a milk license through a stenographic error, should be disregarded and the provision in question read to give effect to the intent of the license.

Opinion Section Memorandum No. 62  
Dated March 28, 1934.





March 28, 1934.

MEMORANDUM TO MR. FRANK

In accordance with your request, I submit my opinion on the following:

QUESTION.

Section 5 (a) of the Los Angeles Milk License as issued by the Secretary, providing that distributors are not to purchase milk from producers unless the producers deduct or cause to be deducted certain payments, contained, through clerical inadvertence, a superfluous word ("not") which, if not stricken, would make the provision wholly meaningless. What is the proper interpretation to be given this provision?

ANSWER

The plain intent of a statute is to be looked at and any interpretation making a statute absurd or meaningless is to be avoided. Assuming that a license has the force and effect of law, therefore, the word "not" should be disregarded and the provision in question read as though it were non-existent.

Two cases should suffice to establish this answer as correct. In the case of State ex rel Patterson v. Bates, 96 Minn. 110, 104 N. W. 709 (1905), the defendant was charged with soliciting persons to purchase liquor in quantities of less than five gallons, in violation of a statute. Section 1 of the statute made it a crime to solicit certain persons to buy liquor in quantities less than five gallons; Section 2 provided that licenses could be issued by the board of county commissioners to sell liquor "in quantities not less than five gallons". The word "not" in Section 2 was an obvious error, but the defendant contended that the statute in question was inconsistent and contradictory, the legislative intention unascertainable, and the statute therefore void. The Court said:

"An interpretation which renders a statute null and ineffective cannot be admitted. It is an absurdity to suppose that after it is reduced to terms it means nothing. It ought to be interpreted in such a manner as that it may have effect, and not be found vain and nugatory'. \* \* \* In order to render this statute consistent and intelligible, it is only necessary to omit the word 'not' from the clause 'quantities not

less than five gallons' in the second section. There is no doubt of the power and right of Courts to thus omit a word, when necessary to render a statute intelligible which as it stands is devoid of sensible meaning.  
\* \* \*

"But it is contended by counsel that there is no more reason why the Court should by construction omit the word 'not' from the clause in the second section than supply it in the first section, which would make the section consistent and the statute valid, but render it entirely inapplicable as far as the defendant in this case is concerned. \* \* \* In Kansas Pac. Ry. v. Com'rs, 16 Kan. 587, Mr. Justice Brewer said that where there is no way of reconciling conflicting clauses, and nothing to indicate which the Legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject. The omission of the word 'not' in the second section renders the statute consistent and intelligible, and in harmony with the general policy of the state as expressed in judicial decisions and general legislation upon the subject-matter of intoxicating liquors."  
(At page: 710-11)

The Court then went on to note that the policy of the State had always been to require licenses only for sale in small quantities. All the prior statutes of the State pointed to an obvious intent to require the license for the regulation of small retail consumption.

"The intended object of the statute under consideration is to prohibit sales in small quantities, and this intention is expressed in the final section of the Act. By disregarding the word 'not' in section 2 the provisions are thus made consistent and the entire statute is brought into harmony with the general policy of the State."

The Court held the statute valid and the conviction of the defendant was affirmed.

In the case of Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, (1909), defendant's tort liability was in part predicated upon a criminal statute prohibiting the use of light oils as illuminating fluids, which it claimed was in effect meaningless. The statute required that oil which shall "have not a specific gravity of not less than 46 degrees Baume" was to be branded "Rejected" by the inspector. Mr. Justice White stated:

"While the two negatives may apparently render the clause on its face confusing, if the superfluous negative be omitted all difficulty on this subject is removed, and the sentence would therefore provide that the oil must have a specific gravity of not less than 46 degrees Baume."

(As a matter of information it should be noted that a Baume hydrometer is read inversely.)

These two cases would seem to justify disregarding the word "not" and reading the license in its sensible construction.

Sigmund Timberg,  
Acting Chief,  
Brief and Opinion Section.





No. 30

POWER OF ACTING SECRETARY OF AGRICULTURE

The "Acting Secretary" is vested with the full powers of the Secretary of Agriculture in the latter's absence; and documents executed by him have the same force and effect as those executed by the Secretary.

References to the Secretary of Agriculture in his official capacity are to be construed as meaning the head of the Department of Agriculture, and, therefore, as including persons temporarily discharging the duties of the office.

Opinion Section Memorandum No. 91  
Dated April 11, 1934.



April 11, 1934.

MEMORANDUM TO MR. PRESSMAN

In answer to your request dated March 30, 1934, I submit the following:

Question

What is the scope of authority of the Assistant Secretary of Agriculture, or other persons, acting for the Secretary of Agriculture in his absence? Particularly, does an "Acting Secretary" have authority (1) to execute Marketing Agreements or Licenses, and to prepare delegations of authority under such instruments, though the Secretary be particularly referred to in them; or (2), to sign Orders to Show Cause in proposed revocation proceedings, and Notices of Revocation?

Opinion

The "Acting Secretary" is vested with the full powers of the Secretary of Agriculture in the latter's absence. Documents executed by him have the same force and effect as those executed by the Secretary. References to the Secretary of Agriculture in his official capacity are to be construed as meaning the head of the Department of Agriculture, and, therefore, as including persons temporarily discharging the duties of the office.

Discussion

(1) Limitation of problem.

In accordance with the request, the scope of this opinion is limited to the problem of validity of action for the Secretary during his absence. Possible delegation of duties and powers during his presence are not discussed.

(2) Statutory provisions applicable.

The provisions governing the temporary discharge of the duties of the Secretary of Agriculture are the same as those applicable to other executive departments. They are:

5 U.S.C.A. Sec. 4,

"Vacancies in office of department heads; temporarily filling. In case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof

shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease. (R.S. § 177)"

5 U.S.C.A. Sec 6,

"Discretionary authority of President as to vacancies. In any of the cases mentioned in the sections 4 and 5 of this title except the death, resignation, absence, or sickness of the Attorney General, the President may, in his discretion, authorize and direct the head of any other department or any other officer in either department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease. (R.S. § 179)"

These sections are made applicable to the Department of Agriculture by 5 U.S.C.A. Section 1, which reads:

"Application of provisions of chapter. The provisions of this chapter shall apply to the following executive departments:

\* \* \* \* \*

Eighth. The Department of Agriculture."

Since section 6 merely provides an alternative method for the discharge of the Secretary's duties, no distinction is made between the Assistant Secretary of Agriculture or other officials, who, pursuant to executive order, may exercise the Secretary's functions.

### (3) Construction.

The headings of sections 4 and 6 refer to vacancies, and it seems evident that the absence of the Secretary is treated as a temporary relinquishment of the office and the "Acting Secretary" as temporary incumbent. As such, he is necessarily vested with the powers as well as the duties of the Secretary.

To hold that there are powers of the Secretary too sacred to be exercised in his absence, would create a type of administrative interregnum which §§ 4 and 6 are obviously intended to prevent. Cases construing the two sections have not attempted such nullification, but have uniformly sustained the power of the "Acting Secretary".

Marsh v. Nichols. 128 U. S. 605 (1888), involved the validity of letters patent. Section 4833 of the Revised Statutes provides that all patents shall be signed by the Secretary of the Interior. In spite of this provision, the court held that if one of the conditions named



in section 4, *supra*, arises, the signature of the "Acting Secretary" has the same force and effect as that of the Secretary himself. Therefore, patents signed by him are of equal validity.

In *Crane v. Nichols*, 1 F (2d) 33 (D.C.S.D. Texas 1924), the validity of a fraud order signed and issued by the Second Assistant Postmaster General was at issue. Against its validity, the contention was advanced that the statute in question conferred upon the Postmaster General a power to issue fraud orders which was nondelegable, and that since the order in the case at bar had been issued by the Second Assistant Postmaster General, it was void upon its face. In answer to this contention, the court relied upon various cases establishing the right of the Postmaster General to delegate to his assistants the conduct of hearings. However, since the power of the Postmaster General to delegate the power to sign the final order was disputed, the court held that, even conceding the nondelegable character of the power, yet under any one of the conditions enumerated in 5 U.S.C.A. Section 4, *supra*, the Second Assistant Postmaster General might be validly vested with the powers of the Postmaster General. The court said (at page 36):

"A review of the evidence and the law applicable to this case establishes that the duty and responsibility of issuing fraud orders was confided by Congress, not to individuals, but to the head of the Department of the Post Office."

In this case, over and above the presumption of validity of official action which would ordinarily attach (see *infra*), affirmative proof had been introduced to the effect that the Second Assistant was, at the time of making the order, Postmaster General "de facto if not de jure."

Also pertinent are a number of cases which rely in the alternative upon (a) a possible delegation of authority from the head of the department to his assistants, or (b) the possible absence of the head of the department.

In this category falls *Franklin Sugar Refining Co. v. United States*, 178 Fed. 743 (C.C.E.D. Penn. 1910). The "Assistant Secretary" of the Treasury issued an order fixing the amount of "countervailing duty to be paid on imports of sugar from Germany". The statute under which such order was issued vested the power in the Secretary. The court held the order valid because (1) the duty to issue such orders might have been delegated to the Assistant Secretary, or (2) in the absence of the Secretary, the Assistant Secretary may act for him,

In *Shillito Co. v. McClung*, 51 Fed. 368 (C.C.A. 6th 1892), a customs appeal was decided by the Assistant Secretary of the Treasury in lieu of the Secretary. Again it was held that his action would be valid if he acted either in pursuance to delegated authority or in the absence of the Secretary. Accord, *Chadwick v. United States*, 3 Fed. 750 (1880), dealing with the certification of a collector's bond.

Of course, the approach of these cases limits their force. Since the reliance is in the alternative upon delegation or substitution, the effect of substitution with reference to delegable powers only is tested. The Crane case, supra, however, expressly decided that an assistant, in the absence of the Postmaster General, may exercise powers which were assumed to be non-delegable.

Ex parte Tsuie Shee, 218 Fed. 256 (D.C.N.D. Cal. 1914), concerned a petition by a Chinaman claiming that his right of appeal from a decision of the immigration authorities to the Secretary of Labor had been denied because the Assistant Secretary of Labor had disposed of the appeal. The court held (1) that the duty to determine an immigration appeal was nondelegable, and (2) that since the Secretary had not been absent, there could be no "Acting Secretary". The court concedes the power of an acting secretary fully to supplant a head of the department in his absence.

The following quotation adequately sums up the applicable law:

"By the terms of this order Mr. Densmore is authorized to perform the duties of the Secretary of Labor only in the absence of the Secretary and the Assistant Secretary. Whenever he does act, the presumption is that he is acting within and according to the authority conferred upon him, and this presumption will prevail until it is overthrown by the clearest proof. From the very fact of his acting the court will presume that both the Secretary and Assistant Secretary were absent, because it is only in their absence that he may lawfully perform the duties which the law casts upon the Secretary, and because any other rule would result in uncertainty and confusion. Whoever, therefore, challenges his right to act, must assume the burden of proving clearly that his action was not had in the 'absence of the Secretary and Assistant Secretary.' But, however inconvenient it may be, if the Secretary and Assistant are not absent, and particularly if both are present, his performance of the duties of the Secretary is unauthorized, either by the statute, or the order of the President." (at page 257).

It was argued for the Government that the Secretary had been "constructively absent". However, it was shown that the Secretary had been at his desk in Washington and this contention was resolved against the Government.

Thus, it seems well settled that those duties of members of the cabinet which cannot be delegated may nonetheless be discharged by "acting" heads of the departments in their absence.



(4) Burden of Proof.

Furthermore, the "Acting Secretary" is favored by a well-settled presumption. This presumption puts the burden of proof that the action of the Assistant Secretary was unauthorized, or that none of the conditions enumerated in § 4 has arisen, upon the person relying upon the invalidity of the action taken. It is based upon the general rule that an officer is presumed to act with lawful authority. (See United States v. Peralta, 19 How. (U.S.) 343 (1856)). It has been applied in Shillito Co. v. McClung, supra, Crane v. Nichols, supra, Chadwick v. United States, supra, but it was overcome in Ex parte Tsuie Shee, supra.

(5) Application of the foregoing.

Sections 4 and 6 are applicable in like manner to the Department of Agriculture as to other Government executive departments. The delegation of authority contained in the Agricultural Adjustment Act would appear to be no more personal than statutes under which it was held that an "Acting Secretary" may validly act for the head of the Department. While it is true that an unusually large measure of discretion has been vested in the Secretary, yet such discretion is vested in him in his official and not in his personal capacity. (cf. the power to fix tariff rates in Franklin Sugar Refining Co. v. United States, supra.)

The Tsuie Shee case and the Crane v. Nichols case, both supra, deal both with a quasi-criminal proceeding which ordinarily would require action by the Postmaster General or the Secretary of Labor, respectively. Both cases, however, indicate that in the absence of those officials the temporary head of the department may act with equal validity. They deal with proceedings no less sacred than proceedings to revoke licenses. Thus, the power of the "Acting Secretary" to sign Orders to Show Cause and Notices of Revocation can safely be said to be determined by them.

No such close analogy can be found regarding the preparation of delegations of authority under Marketing Agreements or Licenses. However, the absence of authority should not preclude a categorical answer. The reference to the Secretary of Agriculture in such instruments could not reasonably be construed as meaning a specific person. It, no doubt, refers to the executive head of the Department of Agriculture. The obvious administrative impossibility of virtually suspending the orderly working of the Department of Agriculture during temporary absences of the executive head of the department requires the conclusion that the parties to agreements and licenses contemplated action under such instruments by the Acting Secretary.

In view of the state of authorities, and the arguments discussed above, it is submitted that an acting secretary has ample power to act for the secretary in all matters pertaining to the discharge of his official duties and powers.

Francis M. Shea,  
Chief of Brief and Opinion Section  
Office of the General Counsel





No. 31.

ADMISSIBILITY IN EVIDENCE OF LICENSES  
AND MARKETING AGREEMENTS

Licenses and marketing agreements of the Agricultural Adjustment Administration are public records, required by law to be kept on file, authenticated copies of which are admissible in evidence under Section 661, 28 U.S.C.A.

Opinion Section Memorandum No. 70  
Dated April 12, 1934.



April 12, 1934

MEMORANDUM TO MR. BACHRACH

Pursuant to your request of March 29, I reply to Question I as follows:

QUESTION I.

Under Section 661 of Title 28 U.S.C.A., would a true copy of a license issued under Section 8 (3) of our Act, or a marketing agreement issued under Section 8 (2) of our Act, be admissible in State and Federal Courts if these documents are "authenticated under the seals" of the Department of Agriculture?

OPINION.

Since both licenses and marketing agreements are entered into by an agent of the Government, in the course of the discharge of his public duty, and are required by law to be kept on file, they are public records, authenticated copies of which would be admissible under Section 661 of Title 28 U.S.C.A.

DISCUSSION.

Section 661 of Title 28 U.S.C.A. provides as follows:

"Copies of department records and papers; admissibility. Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. (R.S. § 882.)"

Concerning the scope of this section, the court in Block v. United States, 7 Ct. Cl. 406, 413 (1871), said:

"Transcripts from the records or books of the different Departments, when authenticated by the seal of such Department, are evidence both at the common law and by statute; but the words 'documents and papers,' used in the several acts of Congress, cannot be held to mean every document or paper on file in the Department, but such only as were made by an officer or agent of the Government in the course of the discharge of his official duty: Any other rule of interpretation would defeat the reason on which all public writings are admissible as evidence, i.e., that they have been made by authorized and accredited agents, appointed for the purpose, and that the subject matter of such writings is of a public nature."

On the basis of this rule it was held in that case that a receipt for property captured, procured from a military governor by a claimant, and by him filed in an Executive Department, is not a public document, and an authenticated copy cannot be read in evidence. However, in Cohn v. United States, 258 Fed. 355 (C.C.A.N.Y. 1919), the court refused to confine the ambit of the statute only to such writings as "were made by an officer or agent of the Government in the course of the discharge of his official duty." In holding that letters used as evidence in a naval court-martial, and required by statute to be transmitted to the Navy Department and there kept on file for two years, are "official documents" while so kept, authenticated copies of which are admissible in evidence equally with originals, the court said at page 362:

"We are not inclined to put so narrow a construction upon the statute, and we can see no substantial reason for thinking that copies of such letters as are on file in the record of the proceedings of the court-martial, and which are authenticated by the Department of the Navy as provided in the act, may not be introduced in evidence at the trial of the defendant. The statute authorizes the introduction in evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is required to be so filed and kept on file is in the opinion of the majority of the court an official document as much so as one which is written or published by an officer in his official character or in the performance of an official duty."

Under either interpretation of Section 661 licenses and marketing agreements are "department records" to which the provision applies.

The Act empowers the Secretary in Section 8 (3) "To issue licenses \* \* \* ", and in Section 8 (2) "To enter into marketing agreements". These documents are, therefore, writings "made by an officer or agent of the Government in the course of the discharge of his official duty".

Licenses and marketing agreements are also records required by law "to be filed and kept on file" in an Executive Department of the Government. Section 10 (c) of the Act provides:



"The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, \* \* \*."

In pursuance of the authority granted, it is provided in General Regulations, Series 4, Revision 1, as follows:

"Section 302 (b). The license when issued shall be filed as a public record in the office of the Chief hearing clerk."

In reference to marketing agreements, General Regulations, Series 1, Revision 1, reads as follows:

"Section 211. Whenever pursuant to a decision of the Secretary, any agreement becomes effective, it shall thereupon be filed in the office of the Chief Hearing Clerk and be available for public inspection."

It is settled that rules and regulations prescribed by a department of the Government in pursuance of a statutory authority, have the force of law. United States v. Grimaud, 220 U. S. 506, 517 (1911); United States v. Birdsall, 233 U. S. 223, 231 (1914); Covey v. United States, 263 Fed. 768, 775 (1920 D. C., Iowa).

Among the cases arising under this section have been: United States v. McCoy, 104 Fed. 669 (Wash. 1900), where a copy of a record authenticated by the Postmaster General as required by this section was held admissible as evidence of the imposition of a fine upon the contractor of a mail route for failure to perform service according to the contract. Copies of the records of the Pension Office were admissible under this section to prove the granting of a pension in Pooler v. United States, 127 Fed. 509 (Mo. 1904). Ballew v. United States, 160 U.S. 187 (1895), was another case in which a transcript of a record in the Pension Office was declared admissible. And on the basis of this section, a certified copy of an application for war risk insurance was admitted in evidence in Cassarello v. United States, 271 F. 486 (D. C. Pa. 1919). Similarly, the court in Priddy v. Boice, 201 Mo. 309, 99 S.W. 1055 (1906), under this statute admitted in evidence copies of United States census returns. 15 Op. Atty. Gen. 342 (1877) contains the statement:

"Under this provision it has been customary to furnish from time to time from the various Departments of the Government copies of papers and documents in addition to the public records relating to lands or patents; and these have been admitted, as it is understood, in evidence at the trial of causes by the various courts." (p.344).

## QUESTION II.

Assuming that such authenticated copy would be admissible, would it be considered as evidence of the execution of such documents by the Secretary on the date such document bears?

### OPINION.

Department records by virtue of their public character are evidence of what they properly contain. They are, therefore, admissible in evidence of the purporting date of the license or marketing agreement. The presumption that the purporting date of a deed is the date on which it was executed which obtained in private contract law appears applicable to Government agreements. Hence, since by the statute copies are made equal to originals, a copy would be considered as evidence of the execution of such documents by the Secretary on the date such document bears.

### DISCUSSION

It is established doctrine that official records are evidence of what they properly contain. Thus, in Evanston v. Gunn, 99 U.S. 660 (1878), where the admissibility of a record kept by the United States Signal Service Station of Chicago to show the velocity of the wind at a certain point was in question, Mr. Justice Strong said at pages 666-667:

"It may be admitted there is no statute expressly authorizing the admission of such a record, as proof of <sup>page</sup> facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. \* \* They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence official registers or records kept by persons in public office in which they required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation. \* \* \* To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. \* \* Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him." (Citing cases.)

Similarly, in Pooler v. United States, supra, page 4 the court in holding a copy of the records of the Pension Office admissible to show the granting of a pension, said: (p. 517)

"Inasmuch as the records of the Pension Office are required by law, they are, of course, on settled rules, evidence of what they properly contain..."

On the same principle, the court in United States v. McCoy, supra, page 4, in admitting a copy of a record as evidence of the imposition of a fine, said: (p. 672)

"The evidence that this fine was imposed is contained in a document authenticated by the postmaster general\* \* \* The document reciting the action of the postmaster general in imposing this fine \* \* \* was prima facie evidence that the fine had been imposed \* \* \*." (Italics ours)

And in Commonwealth v. Dorr, 103 N.C. 902, 210 Mass. 314 (1914), the records of the United States Weather Bureau were admitted in evidence to prove weather conditions at a particular time, on the same doctrine:

"The official record of a fact made by a public officer in the performance of his duty may be introduced in evidence as proof of the truth of the fact recorded. This rests upon the general principles of the law of evidence, and not upon the statutes." (p. 904)

Since the date of a license of marketing agreement is a fact properly contained therein, it follows that the official record may be introduced in evidence of it.

On the question whether the date on the official documents would be considered as evidence of the execution of such documents by the Secretary on the date such document bears, certain cases in private contracts are relevant. That the date of signing of a contract may be presumed from the purporting date of the document, has been held in Smith v. Bathens, 1 Moo. & R. 341 (1834); Hunt v. Massey, 5 B & Ad. 902 (1834); Goodtitle v. Milburn, 2 M & W. 853 (1837); Sinclair v. Baggaley, 4 M. & W. 312 (1838); Anderson v. Weston, 6 Bing. 309 (N.C. 1840). The California Code of Civil Procedure 1872, § 1963, par. 23, codifies this rule in the provision "it is presumed\* \* \* That a writing is truly dated". And in McFarlane v. Loudon, 99 Wis. 620, 75 N. W. 394 (1898), it was held that where a deed appears to be duly executed the presumption is that it was executed upon the day it bears date, citing Jones, Evid. § 45, 19 Am. & Eng. Enc. Law. 50.

This presumption would appear to be equally applicable to public documents. It therefore follows that the date on the license or mar-



keting agreement would be considered as evidence of the execution of such documents by the Secretary on the date such document bears.

Since by the statute a copy of a department record is made equal to an original for all purposes of evidence (see United States v. McCoy, Pooler v. United States and Ballew v. United States, *supra*, page 4) an authenticated copy of a license or marketing agreement would be considered as evidence of the execution of such documents by the Secretary on the date such document bears.

Francis M. Shea,  
Chief, Brief and Opinion Section.



No. 32

REINDEER AND REINDEER MEAT

Reindeer and reindeer meat are "agricultural products" within the meaning of Section 12 (b) of the Agricultural Adjustment Act providing for the removal of surplus agricultural products.

Opinion Section Memorandum No. 64  
Dated April 13, 1934.



April 13, 1934.

MEMORANDUM TO MR. FRANK

I respectfully submit herewith my opinion on the following question raised by Mr. John B. Payne in his memorandum of February 10, 1934:

QUESTION

Are reindeer and reindeer meat "agricultural products" within the meaning of Section 12 (b) of the Agricultural Adjustment Act providing for the removal of surplus agricultural products?

OPINION

Reindeer and reindeer meat do not differ essentially from other forms of live stock and live stock products, and, as such, are "agricultural products" within the meaning of Section 12 (b) of the Act.

1.

The term "agricultural products" includes live stock and live stock products.

Agriculture, according to accepted definition, includes the rearing and management of live stock. See Slycord v. Horn, 179 Iowa 936, 163, N. W. 249, 253 (1917); Gordon v. Buster, 113 Tex. 382, 257 S. W. 220, 222 (1923); Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 857, 847 (1924); Fleckles v. Hille, 83 Ind. App. 715, 149 N. E. 915 (1925). Live stock is accordingly included in conventional definitions of agricultural commodities and agricultural products and Congressional enactments follow the general rule. Thus, in the Cooperative Marketing Act of 1926 (44 Stat. 802) "agricultural products" are defined as "agricultural horticultural, viticultural and dairy products, live stock and the products thereof..." etc. The Capper Volstead Act (42 Stat. 388), authorizing producers of "agricultural products" to form associations to engage in marketing and processing in interstate and foreign commerce provides that "persons engaged in the production of agricultural products as farmers, planters, ranchmen," etc. may act together in marketing associations.

The Agricultural Marketing Act of 1929 (46 Stat. 11), designed "to promote the effective merchandising of agricultural commodities", contains no definition of agricultural commodities, but the definition of "agricultural products" contained in the Cooperative Marketing Act has been regarded as strong evidence of the meaning Congress intended to give the term "agricultural commodities" in the later Act. 36. Op. Atty. Gen. 326, 344 (1930). It is therefore apparent that Congress in enacting legislation for the benefit of agricultural producers has recognized "agricultural products" as including both live stock and live stock products.

No reason appears, either in the purpose or history of the Agricultural Adjustment Act, for giving to the same term, as used in Section 12 (b), a narrower construction. The term "basic agricultural commodities", as defined in the Act itself, includes hogs. While no definition is given the term "agricultural products" as used in Section 12 (b), providing for the removal of surplus, its proper construction was the subject of a memorandum from the Solicitor of the Department of Agriculture to the Secretary under date of November 16, 1933 (Op. Sec. Memo. No. 17). This sets forth the conclusion, based upon a review of the authorities, that the term includes all products in their raw or natural state which are the result of husbandry or the cultivation of the soil, and that it may also include such products after processing and manufacture, either at the point of production or elsewhere. The term, thus construed, is broad enough to embrace <sup>both</sup> live stock and the meat products thereof.

2.

Reindeer and reindeer meat fall within the definition of live stock and live stock products.

The term "live stock" is defined to include "various domestic animals raised or used, as on a farm or ranch". Funk & Wagnalls New Standard Dictionary (1929). Alaskan reindeer, introduced into Alaska by the government in domesticated herds, are useful for their meat and skins and as draft animals. They are raised, slaughtered, and prepared for market by methods essentially similar to those by which standard varieties of live stock such as cattle and sheep, are made available to the market. Congress has appropriated funds for the instruction of the natives in "the care and management of reindeer," (43 Stat. 1181), which constitutes a recognized branch of animal husbandry. Department of Agriculture, Circular No. 82 (1929), "Improved Reindeer Handling". The business of raising and slaughtering reindeer, and of marketing the meat in the United States, has been developed on a commercial scale by private interests. See Department of the Interior, Hearings of the Reindeer Committee, February 20, 1931. Reindeer therefore fall within accepted definitions of "live stock", and since live stock and live stock products generally are subject to the terms of the Act, it follows that reindeer and reindeer meat are similarly included.

Francis M. Shea.



No. 33

CONSTRUCTION OF TERM "SHIPMENTS UPON  
CONSIGNMENT" IN CODE OF FAIR  
COMPETITION

The prohibition "to sell upon consignment"  
contained in Article IV, Sec. 14  
of the Code of Fair Competition for  
the Anti-Hog-Colera Serum and Virus  
Industry includes the prohibition  
"to ship upon consignment."

Opinion Section Memorandum No. 66  
Dated April 20, 1934.



April 20, 1934.

MEMORANDUM TO MR. FRANK

In accordance with your request, I submit my opinion on the following:

QUESTION

According to Article IV, Section 14 of the Code of Fair Competition for the Anti-Hog-Cholera Serum and Hog-Cholera Virus Industry, the practice: "To sell serum and/or virus upon consignment" constituted an unfair method of competition and was therefore prohibited. Does this prohibition also include the practice "to ship upon consignment"?

OPINION

The prohibition "to sell upon consignment" includes the prohibition "to ship upon consignment".

DISCUSSION

The term "consignment", in a mercantile sense, means the delivery or shipment of personal property from one merchant, - the consignor - to another, - the consignee - to be held by the consignee as a bailee for the purposes of sale. If the property is sold by the consignee-bailee, he must account to the consignor for the purchase price. At all times legal title to the property remains in the consignor. Williston, Sales (2d ed., 1924) § 338. A "consignment" therefore is not a sale, and its existence negatives the possibility of a sale. Furthermore, it is not a conditional sale.

"A contract of conditional sale is one in which a vendor of property agrees to sell, and a vendee agrees to buy, certain property, the title to which does not pass to the vendee until he performs the agreed condition of payment of the purchase price, with the right in the vendor, on default by the vendee, either to recover possession of the property or, at his election, to sue for the purchase price and thus transfer title to the vendee and convert the conditional sale into an absolute sale, the payment of such price as a condition of such transfer being thereby waived.

"A contract of consignment has an entirely different meaning and effect. It imposes no obligation upon the consignor to sell or upon the consignee to buy any property, and it effects no sale or transfer of title, conditional or absolute, from consignor to consignee. It merely creates a bailment, between the consignor as bailor, and the consignee as bailee, of property of the bailor, with authority in the bailee as his agent to sell such property to third persons and with the duty to account to him for the proceeds of any such sale. On such a sale the title passes, not from the consignor to the consignee, as in a contract of conditional sale, but from the consignor as owner, through the consignee as his agent, to the purchaser. In the absence of such a sale the consignee may return the property to the consignor without liability for the purchase price thereof." In re Taylor, 46 Fed. (2d) 326, 328 (Dist. Ct. Mich. 1931).

Nor is it the kind of transaction technically termed a "sale or return". In such a transaction, the "title" is said to pass to the purchaser subject to his option to return the property. Sturm v. Boker, 150 U. S. 312 (1893). In a "consignment" no "title" in any form passes to the consignee, but instead, if a sale is effected by the consignee, "title" passes from the consignor directly to the purchaser. In re Sachs, 31 Fed. (2d) 799, (Dist. Ct. D. Md. 1929).

It is apparent that the code prohibition against "sale upon consignment" was intended to have no reference to sales, be they of the outright, conditional, or "sale or return" variety. Trade practice, which is determinative of the meaning of such business terms, leaves little doubt that the evil which the code section intended to eliminate was that of actual consignments, which were an outgrowth of the necessity which producers felt for ridding themselves of surplus stocks of serum. The code hearings confirm this interpretation. See Hog-Cholera Virus Industry Hearing at pages 186 and 187.

If "sale upon consignment" be construed to mean "consignment", and to do otherwise would render the phrase self-contradictory, the word "ship" presents no added difficulty. Shipment is an integral part of the concept of consignment, and therefore the phrase "to ship upon consignment" is redundant, but is not otherwise defective.

"To consign, in the mercantile law, is, ordinarily, to send or transmit the goods to a merchant or factor for sale, and a consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted'." Powell v. Wallace, 44 Kan. 656, 25 Pac. 42, 43 (1890). (Italics ours)



Furthermore, a consignee is defined as,

"'A person to whom goods are shipped for sale,\*\*\*'".

"It has also been held that a 'consignee' is a person to whom personal property of any kind is delivered for the purpose of sale." The Astorian, 2 Pac. (2d) 1004, 1006 (Cal. Dist. Ct. App. 4th 1931). (Italics ours).

"'To consign,' in mercantile terms, is ordinarily to send or transfer goods to a merchant or factor for sale, and the consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted,\*\*\*". Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572, 578 (1911).

There cannot be any consignment without a delivery, either actual or constructive, of the property. "'Consigned' connotes delivery". James Freeman Brown Co. v. Harris, 88 S. C. 558, 70 S. E. 802, 803, (1911).

"Shipped" is a broad term, and has been construed to mean any kind of delivery out of the custody of one person into that of another. It may mean "change of custody". Noble v. People, 67 Colo. 429, 180 Pac. 562, 563 (1919); State v. Carson, 147 Ia. 561, 126 N. W. 698 (1918). It has been construed to be synonymous with the word "transport". Burton v. State, 135 Ark. 612, 206 S. W. 51 (1918). And also with "delivery". Bird v. State, 131 Tenn. 518, 175 S. W. 554 (1915). Therefore, inasmuch as "consigned" and "shipped" both contemplate delivery, the use of the word "shipped" would add nothing to the use of the word "consignment".

While the use of the phrase "sale upon consignment" is somewhat ill-advised as leading to confusion, the determination of the question whether a transaction is in fact a "sale" or a "consignment" is primarily dependent upon the intent of the parties. In re Taylor, 46 Fed. (2d) 326 (Dist. Ct. Mich. 1931). Since the code section, in prohibiting "sales upon consignment", clearly intended to prohibit "consignments", and inasmuch as the term "ship" is already contained in the term "consignment", it is my opinion that a prohibition "to sell upon consignment" would include a prohibition "to ship upon consignment".

Francis M. Shea,  
Chief of the Brief and Opinion Section  
Office of the General Counsel



No. 34

EVIDENCE - STATISTICAL MATERIAL  
AND TESTIMONY OF EXPERTS OF THE  
DEPARTMENT OF AGRICULTURE.

Statistical material relating to the marketing of milk as embodied in various bulletins and circulars of the Bureau of Agricultural Economics of the United States Department of Agriculture, compiled by public officers in the performance of duties prescribed by law, is admissible in evidence of the facts therein contained.

Experts in the Department of Agriculture are competent witnesses as to market conditions over extended areas, upon which they are required to collect information, notwithstanding the fact that they may have no immediate personal knowledge of such conditions.





April 24, 1934.

MEMORANDUM TO MR. ABT.

In reply to your memorandum of April 17, 1934, as supplemented by conference, I submit herewith my opinion upon the following:

QUESTION

May statistical material relating to the marketing of milk, embodied in various bulletins and circulars of the Bureau of Agricultural Economics of United States Department of Agriculture be admitted in evidence in a state court, either (1) by the introduction of the documents themselves, properly authenticated, or (2) by the testimony of experts in the Department under whose direction such material has been collected and compiled but who are without immediate personal knowledge of the facts contained?

OPINION

- (1) Publications of the character described, since they are compiled by public officers in the performance of duties prescribed by law, are admissible in evidence of the facts therein contained.
- (2) Experts in the government service are competent witnesses as to market conditions over extended areas, upon which they are required by law to collect information but of which they have no immediate personal knowledge.

DOCUMENTS SOUGHT TO BE ADMITTED

1. Circular No. 16, October, 1927 - United States Department of Agriculture - SOME ECONOMIC ASPECTS OF THE MARKETING OF MILK AND CREAM IN NEW ENGLAND - By William A. Schoenfeld, Senior Agricultural Economist, Division of Cooperative Marketing, Bureau of Agricultural Economics (Printed by the Government Printing Office.)
2. United States Department of Agriculture - Bureau of Agricultural Economics - DAIRY AND POULTRY MARKET STATISTICS 1933 Annual Summary - Collected and Compiled by Division of Dairy and Poultry Products (Mimeographed compilation)

5. CROPS AND MARKETS - Vol. 10, No. 4 - INCOME FROM FARM PRODUCTION IN THE UNITED STATES, 1932 (Printed publication of the United States Department of Agriculture)
4. United States Department of Agriculture - Bureau of Agricultural Economics - Division of Crop and Livestock Estimates - STATISTICAL SUPPLEMENT TO "MILK PRODUCTION TRENDS" - MILK PRODUCTION IN THE UNITED STATES UTILIZATION ON FARMS AND VALUE - With Details by States 1929-1932 (Mimeographed and described as "an occasional publication for transmitting certain dairy statistics needed currently by Agricultural Statisticians of the Department and by those interested in local or regional aspects of the dairy situation.")
5. United States Department of Agriculture - Bureau of Agricultural Economics - Market News Service - FLUID MILK MARKET REPORT FOR THE UNITED STATES MONTH OF JANUARY 1929. (Mimeographed and bearing the explanation that "Prices which appear in this report are secured through the co-operation of milk distributors, producers' associations, and municipal officers.")
6. United States Department of Agriculture - Bureau of Agricultural Economics - RECEIPTS OF CREAM AT BOSTON & METROPOLITAN AREA FOR YEAR 1929 (mimeographed and issued from Boston, Mass.)

Statutory Authority for Publications  
of the  
Bureau of Agricultural Economics

The act establishing a Department of Agriculture, 12 Stat. 387-388 (1862) provides:

((Sec. 1.) "There is hereby established at the seat of Government of the United States a Department of Agriculture, the general designs and duties of which shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture in the most general and comprehensive sense of that word, \* \* \*."

The general powers of the Bureau of Agricultural Economics are derived from the act establishing the Bureau, 42 Stat. 532 (1922), 7 U.S.C.A. Section 411, in which it is stated that:

"The powers conferred prior to May 11, 1922, and the duties imposed by law on the Bureau of Markets, Bureau of Markets and Crop Estimates, and the Office of Farm Management and Farm Economics of the Department of Agriculture shall be exercised and performed by the Bureau of Agricultural Economics."

The first provision made by Congress for the collection and diffusion of marketing information was contained in the agricultural appropriation act for 1914, 37 Stat. 854, and led to the creation, by admin-

istrative action only, of the Office of Markets, which became a Bureau of Markets when the departmental appropriation act for the fiscal year ending June 30, 1918, made provision for its work under that name. 39 Stat. 1162. Express provision for acquiring and disseminating information of various kinds, through the Bureau of Agricultural Economics, is now regularly made in the annual appropriation acts for the Department of Agriculture. The appropriation act for the fiscal year ending June 30, 1934, 47 Stat. 1432, contains the following provisions (pages 1458-59-60):

"Marketing and distributing farm products: For acquiring and diffusing among the people of the United States useful information, on subjects connected with the marketing, handling, utilization, grading, transportation, and distributing of farm and non-manufactured food products and the purchasing of farm supplies," etc.

"Market news service: For collecting, publishing, and distributing, by telegraph, mail, or otherwise, timely information on the market supply and demand, commercial movement, location, disposition, quality, condition, and market prices of livestock, meats, fish, and animal products, dairy and poultry products, fruits and vegetables, peanuts and their products, grain, hay, feeds, tobacco, and seeds, and other agricultural products, independently and in cooperation with other branches of the Government, State agencies, purchasing and consuming organizations, and persons engaged in the production, transportation, marketing, and distribution of farm and feed products, \$1,300,000."

## DISCUSSION

### A - Documentary Evidence

#### (1)

Regardless of their governmental character, the publications in question, insofar as they contain reports of market prices and conditions upon which persons in the industry generally rely as accurate and authentic, are admissible in evidence of the facts contained.

Statistics which appear in the publications of the Bureau of Agricultural Economics consist in large part of cumulative records of market movements and prices, based upon actual transactions. As such they are similar to market reports of a statistical character appearing in newspapers and trade journals which, when relied upon generally as accurate by dealers in the market, are, by general rules of law, admissible as evidence of market conditions and prices. As stated in Sisson v. Cleveland & Toledo Ry. Co., 14 Mich. 489, 90 Am. Dec. 252, 255 (1866):



"Such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries and individual sales or inquiries."

Among instances of the application of this rule are: Chicago, B & Q. Ry. Co. v. Todd, 74 Neb. 712, 105 N.W. 83 (1905) (stockmen's journal as evidence of state of (1910) market and sales of sheep); Texas & P. Ry. Co. v. Isenhower, 62 Tex. Civ. App. 223, 131 S.W. 297 (1910) (semble); Burns Mfg. Co. v. Clinchfield Products Corp., 189 App. Div. 569, 178 N. Y. Supp. 483 (1919) (Oil Paint and Drug Reporter giving daily sales and quotations as evidence of value of product not generally on the market). The doctrine is not confined to market quotations and reports but on principle extends also to registers of facts regularly reported in trade journals or reports of societies and relied upon as authentic and official for the purposes of the trade. Thus the speed record of a horse as given in the report of the American Trotting Association which keeps records of extraordinary speed made at races under the authority of recognized racing associations is admissible evidence on the matter of value. Pittsburg etc. R. Co. v. Sheppard, 56 Ohio St. 68, 46 N.E. 61 (1897). So, in determining the value of heifers registered therein, a herd-book is admissible as "an historical work of a particular subject." Kuhns v. Chicago etc. R. Co., 65 Iowa 528, 22 N.W. 661 (1885).

A justification of the admission of such records as exceptions to, or modifications of, the hearsay rule has been set forth by the Supreme Court in Cliquot's Champagne, 70 U.S. (3 Wall.) 114 (1865), in which copies of Prices-Current obtained from dealers in Paris were admitted as throwing light on market values at the place of production, a short distance away, at which there was no general market for the product:

"While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy--itself a serious evil--without giving any additional safeguard to the interests of justice. We think the Price-Current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness..." (p. 141).

It should be noted that these prices were not shown to represent actual transactions, sometimes indicated as necessary to make such figures admissible. See Brockman Commission Co. v. Aaron, 145 Mo. App. 307, 130 S.W. 116, 119 (1910). In respect to newspapers and trade journals,



however, it appears sufficient if there is "a showing by extrinsic evidence that their market reports are based upon reliable sources of information." See Fountain v. Railway, 114 Mo. App. 676, 90 S.W. 393, 394 (1906); Jones Commentaries on Evidence (2nd ed.) Section 1754.

Under this doctrine reports of market conditions in Departmental publications, if shown to be derived from trustworthy sources and generally relied upon as accurate by milk producers and others in the milk industry as should be admissible in a state as well as a federal court, without reference to their official governmental character.. This rule, however, is not the best basis for the introduction of material of this character for the reason that such publications, because of their official nature, enjoy a special sanction and constitute a special exception to the hearsay rule.

(2)

The rule that official records of fact made by a public officer in the performance of his official duties may be introduced in evidence of the facts recorded extends to statistical data of an economic nature.

Under general rules of law, and independent of statute, an official record of fact made by a public officer in the performance of his official duties may be introduced in evidence of the truth of the facts recorded. This doctrine is most familiarly applied to records of transactions of business which is itself governmental in character. Thus the records of the Pension Office are admissible to prove the granting of a pension. Pooler v. United States, 127 Fed. 509 (Me. 1904). Land Office records constitute ample proof as to proceedings in the United States Land Office relating to the land in question. Harmening v. Rowland, 25 N.D. 38, 141 N.W. 131 (1913). In admitting a state register to prove facts as to election returns set forth in the governor's proclamation printed therein, it was said in Lurton v. Gilliam and Challen, 2 Ill. 577, 33 Am. Dec. 430, 431 (1839):

"The state register, being made by law the public paper in which the official acts of the governor required to be made public, are to be published, was evidence of the existence of the proclamation and the facts stated in it,..."

Records of facts and events which do not constitute a part of the transaction of public business, but of which public officers are required to take notice and made record are also within the scope of the rule. Thus, an authenticated record of the United States War Department may be accepted as plenary proof of the death of a soldier in the service of the United States. In re Straulina's Estate, (N.J.) 134 Atl. 88 (1926). The same principle dictated the acceptance of a record of a United States Signal Service Station as evidence of wind velocity on a given date in Evanston v. Gunn, 99 U.S. 660 (1878), and of records of the United States

Weather Bureau in Commonwealth v. Dorr, 216 Mass. 314, 103 N.E. 902 (1914).

A common illustration is the admission of United States census returns: Priddy v. Boice, 201 Mo. 309, 99 S.W. 1055 (1906); State v. Neal, 25 Wash. 264, 65 Pac. 188 (1901). As to these it appears that the courts will also take judicial notice. State v. Marion County Court, 128 Mo. 427, 30 S.W. 103, 31 S.W. 23 (1895); and see People v. Williams, 64 Cal. 87, 27 Pac. 939, 940 (1883). That the purpose for which such statistics are collected will affect the purposes for which they will be regarded as competent evidence is indicated in Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905) in which census records were held not competent to prove that a particular person was not in esse at a given time. Census returns are thus deemed competent to prove facts of a public nature but not to prove details about particular individuals or objects, such as the age or a particular person, product of a particular factory, etc. Jones Commentaries on Evidence (2nd ed.) Section 1755.

No valid reason appears why official reports of the Department of Agriculture on economic data scientifically compiled from the most accurate available sources of information should not be admitted as a simple and reasonable method of proving facts of a complex nature covering a large territory. Such admission is within the principles supporting the cases cited above. It avoids needless prolongation and labor in the making of proof. See Cliquot's Champagne, 70 U.S. (3 Wall.) 114, 141 (1865). Moreover, such material, embodying as it does a comprehensive survey, presents a more accurate total picture than can entries upon individual transactions by scattered dealers; see Sisson v. Cleveland & Toledo Ry. Co., supra, 90 Am. Dec. at 255; or the testimony of individuals having opportunity to observe sales or conditions in particular localities. See Grayson v. Lynch, 165 U.S. 468, 481 (1896). As official documents, they are subject to the same conditions which are recognized as giving assurance of trustworthiness to records made pursuant to the performance of a public duty and subject to public examination or general publicity. The report of a State Agricultural Society, printed as a public document and presenting economic information and statistics collected pursuant to duties prescribed by law has accordingly been held admissible as to facts therein contained regarding the products of the state. Vallejo & N.R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915). The admissibility of the report itself as a public document was supported by particular provisions of the California Codes, but, the court relied only upon general principles of law in declaring that as such it "constituted legal evidence of the facts therein stated regarding the products of the state and its subdivisions, although, of course, not conclusive thereon."

In order that records should be admissible in evidence on the basis of their official character, it is not necessary that they be expressly required by statute. It is sufficient if they are required in the performance of duties generally prescribed. See Evanston v. Gunn, 99 U.S. 660, 666 (1878). In that case the record of weather conditions admitted had been made in routine course under a system required by statute to be set up in order to report information useful to agriculture, etc. Examining the publications now sought to be admitted, it is apparent that all are prepared in the course of official duties pursuant to statutory provisions. Appropriations are made expressly for the market news service.



47 Stat. 1432, 1460. The other material is all within the scope of the more general provision for acquiring and diffusing information on "marketing and distributing farm products." Ibid, at 1458. The Bureau of Agricultural Economics is not only empowered, but it is under a duty, to collect and report such data. Thus the act creating the Bureau states that "the powers conferred ... and the duties imposed by law on the Bureau of Markets ... shall be exercised and performed by the Bureau of Agricultural Economics." 42 Stat. 532. The "general design and duties" of the Department itself call for the acquisition and diffusion of useful information on agricultural subjects. 12 Stat. 387. The compilations and publications now in question are therefore clearly within the definition of records made in pursuance of official duties imposed by law.

As to admissibility and competence, the distinction between public documents setting forth facts of a general nature and private publications is well illustrated in a Massachusetts case in which the character of certain islands as "guano islands" was at issue. Whiton v. Albany and Narregansett Insurance Companies, 109 Mass. 24 (1871). Congress having authorized taking possession of guano islands, under certain circumstances of discovery, the Senate called upon the President for information in regard to the occupation of the island of Navassa. Accordingly there was communicated to the Senate and ordered printed various executive documents including letters to and from various officers of state setting forth data concerning the guano deposits alleged to have been discovered. These and the act of Congress and proclamations issued by the Secretary of State were held competent. On the other hand, an article in an encyclopedia was held rightly rejected.

"A book published in this country by a private person is not competent evidence of facts, stated therein, of recent occurrence, and which might be proved by living witnesses or other better evidence; and the book in question, not being shown to have been approved by any public authority, or to be in general use among merchants or underwriters, had no tendency to show that the island of Navassa was commonly called and known as a guano island." (p. 31).

It is to be observed that in this case the fact in question was not ascertained by investigation of any scientific character. Looking to the reason for the hearsay rule, it cannot be doubted that the extensive facilities and resources, the many cooperating reporters both official and unofficial, and the highly scientific methods through which the data of the Bureau of Agricultural Economics is collected and compiled gives added reason of a most persuasive character for accepting its publications as competent evidence of the facts therein contained, and hardly possible to assemble except by an elaborate machinery operating under governmental authority. For a description of the resources and technique employed see U. S. Department of Agriculture, Miscellaneous Publications No. 171, for a description of "The Crop and Livestock Reporting Service of the United States."

It is not within the scope of this memorandum to consider the status of these publications as copies of the records originally compiled or the proper mode of offering them in evidence. This is provided for in Section 661, 28 U.S.C.A., Rev. Stat. Section 882. Federal statutory provisions of this nature, however, are not exclusive. Willock v. Wilson, 178 Mass. 68, 59 N.E. 757 (1901) (referring to Section 687 U.S.C.A.); Harmening v. Howland, 25 N.D. 38, 141 N.W. 131 (1913) (referring to Section 661.) For general Massachusetts rule, see Saxton v. Nimms, 14 Mass. 315.

#### B - Testimony of Department Officials

The question of whether officials of the Department may be used as witnesses as to facts set forth in government publications prepared under their direction, when the facts are beyond their own range of observation has two aspects: (1) whether they are competent at all, and (2) whether their testimony is or is not better evidence of the facts set forth than the publications themselves.

The cases which deal with market prices will not be considered here in detail but they suggest that the expert quality of the observer will affect the admission of testimony based upon examination of current records of sales. In Union Pac. R. Co. v. Perrine, 267 Fed. 657 (1920) the testimony of witnesses as to market bulletins and records examined at the time in question to show the market price was held properly rejected, the bulletins and records themselves not being produced and those who prepared them not being present to testify. "Nor, if they had been thus verified would testimony ... to their contents have been competent, in the absence of proof that the bulletin and records had been lost or that it was impracticable to produce them or legally authenticated copies of them in evidence because they were better evidence of their contents than the testimony of those who saw them." Ibid. at 659. The witnesses in this case were not shown to be dealers. In Howell v. Hines, 298 Mo. 282, 249 S.W. 924 (1923), in which the market price of hogs was characterized as a fact to be proved, the testimony of a dealer daily informed by reports published in stockyard reporters letters from commission firms, was held admissible, with this comment:

"the market price of live stock is fixed by the manifold transactions occurring from day to day in these great centers of trade. The dealer is there in constant touch by wire with the local trade throughout the country, and public journals are printed and sent to local dealers and producers throughout the territory covered by its operations. The prices are established, regulated and controlled by the aggregate of their transactions, and it is evident that the opinions which they form from all these sources and upon which they rely in every deal is evidence of the state of the market." (p. 929).

So also the testimony of a witness as to the value of wheat in a particular market over a period of years is properly admitted when his knowledge is derived from inquiries of large dealers of wheat at that place,



and from an examination of their books. Lush v. Druse, 4 Wend. (N.Y.) 313, cited with approval in Cliquot's Champagne, 70 U.S. (3 Wall.) 114, 141 (1865). There is an obvious distinction, not always stated but implicit in such cases, between the testimony of the untrained observer as to the fact of market price when based upon an occasional examination of current records and reports and the testimony of dealers or experts based upon a continuous practice of keeping posted upon market price and transactions through a variety of such sources.

In Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915), in connection with the testimony of a civil engineer familiar in general with a largely undeveloped territory, a map was introduced compiled by him in part on the basis of personal observation and in part from the most accurate sources available to him, including official government reports. The court concluded that "sufficient foundation had been laid to qualify the witness to state approximately the respective areas of reclaimed and unreclaimed land and for the introduction of the map. It was not a subject upon which accurate and precise information could easily be produced." The court recognized both the expert character of the witness and the difficulty of securing complete data through ordinary modes of proof as a reason for admitting his testimony.

Authority on the testimony of witnesses especially qualified by training and required as a matter of public duty to collect information from a wide variety of sources is found in Grayson v. U. S., 163 U.S. 468 (1896). In this case the testimony of officers of the Bureau of Animal Industry of the United States Department of Agriculture was held competent as to the existence of the Texas cattle fever in certain regions, such information being acquired by them as a part of their official duties, although based only upon reports and statistics collected by them and not upon personal observation.

In regard to the expert character of these witnesses, the court stated: (p. 480)

"Salmon resided in Washington, was a professor of veterinary medicine, chief of the United States Bureau of Animal Industry, and at the time in the service of the United States Government. He had held this position for more than ten years; had been chief of the veterinary division of the Department of Agriculture; had been in the employ of the Department of Agriculture, investigating the diseases of animals, for over fifteen years, and was called to Washington about 1883 in the discharge of his duties. He had investigated the disease known as the Texas fever. Detmers resided in Illinois, was a veterinary surgeon, and had been in the employ of the Department of Agriculture for the purpose of investigating contagious, infectious and epizootic diseases of horses, cattle and swine, and had investigated the disease known as Texas fever, and was acquainted with its symptoms and diagnosis; had made a good many post mortem examinations of cattle that had died with it, and was familiar with the disease. If these gentlemen, who were connected with the Department of Agriculture and made a specialty

of investigating animal diseases, were not competent to speak upon the subject as experts, it would probably be impossible to obtain the testimony of witnesses who were."

In regard to the competency of their testimony on facts not within the range of direct observation, the court continued:

"The fact that they spoke of certain districts of Texas as being infected with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the correspondence of the department and in the investigation of such diseases, they would naturally become much better acquainted with the districts where such diseases originated or were prevalent, than if they had been merely local physicians and testified as to what came within their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent, and how they became disseminated throughout the country. Spring Co. v. Edgar, 99 U. S. 645; State v. Wood, 53, N.H. 484; Dole v. Johnson, 50 N.H. 452; Emerson v. Lowell Gas Light Co. 6 Allen, 148."

The principles which sustained the introduction of this testimony in the Grayson case are applicable to sustain the testimony of officials in another bureau of the Department of Agriculture as to marketing facts and conditions of which they have become informed in the course of their official duties through an elaborate reporting machinery. The opinion does not suggest a necessity of placing in evidence the original reports upon which their information was founded, a requirement which would enormously complicate the burden of proof. The expert qualifications of the witnesses themselves, the official capacity in which their knowledge is acquired, furnish sufficient justification for treating their testimony as not within the ban of the hearsay rule.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
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No. 35

SUITS BY CONTROL COMMITTEE  
AND MARKET ADMINISTRATOR

The Control Committee, established under a license issued under the Agricultural Adjustment Act, may sue in the name of its individual members for the assessments levied for administrative expenses.

When a license provides for payments to be made by the licensees to the market administrator appointed by the Secretary, the market administrator may sue in his own name for moneys payable to him under the license.





April 24, 1934.

MEMORANDUM TO MR. BACHRACH

Pursuant to your request, I submit herewith an opinion upon the following:

QUESTIONS

May a Control Committee (established under one of the various licenses issued by the Secretary of Agriculture for fruits and vegetables) sue, in its own name, for assessments levied upon members of the licensed industry?

May a Milk Market Administrator (established under one of the milk licenses) sue, in his own name, individual distributors for monies which, by the terms of the license, are payable to the Market Administrator?

CONCLUSIONS

The Control Committee may sue in the name of its individual members for assessments levied for administrative expenses.

The Market Administrator may sue, in his own name, individual distributors for deductions from payments to producers, which deductions the license authorizes to be paid the Market Administrator to cover administrative expenses and expenses in securing specified benefits to producers. The administrator may also sue, in his own name, distributors for monies payable to the Administrator for the adjustment fund or market pool.

The right of the Control Committee or Market Administrator to sue in his own name may be present independently of license provisions expressly granting such right.

DISCUSSION

Preliminary Note

The payments to the Control Committee required by the licenses for fruits and vegetables are for the purpose of meeting administrative expenses. The payments to the Market Administrator under the milk

licenses go in part for identical purposes, and in part for other designated objectives. For simplicity's sake, in view of the similarity of the legal problems involved, reference will hereafter be made solely to the right of the Market Administrator to sue for the payments. If the Market Administrator may sue in his own name for monies to meet administrative expenses, it seems clear that a Control Committee may sue in the name of its individual members for monies to be used for a similar purpose.

Furthermore, the constitutional validity of the license provisions requiring payments to the Control Committees or Market Administrators is assumed. The only question, therefore, here under consideration is whether the Control Committees or Market Administrators may bring suit in their own names.

Inasmuch as the Market Administrator is, under the terms of the license, both payee and distributor of the funds which are to be raised it would appear reasonable to give him the power to sue for such funds. The power to receive and disburse monies would, prima facie, seem to imply the power to sue therefor, especially where no other means of collection is apparent on the face of the license. Three possible objections, however, may be raised to a suit by the Market Administrator, and these objections it shall be the purpose of this opinion to refute.

1. A civil action will not, in the absence of express statutory authority, lie to enforce an obligation imposed by statute.
  2. Section 8 (3) of the Agricultural Adjustment Act, in providing for revocation of a license for violation of the terms thereof, sets forth an exclusive remedy.
  3. 5 U.S.C.A § 327, providing that suits by the United States for "revenues and debts due and accruing to the United States" must be brought in manner specified by the Solicitor of the Treasury with the approbation of the Attorney General, must be complied with.
1. A civil action to enforce the obligations to pay imposed by a license will lie in the absence of express authorization therefor.

Since a license has the force and effect of law, a provision in a license expressly granting to the Marketing Administrator the right to sue in his own name to collect the monies would be equivalent to a direct statutory authorization. However, even in the absence of such express authorization, the right of the Market Administrator to sue would still be clear, for there is an obligation owing to him.

Language in a number of cases is to the effect that a civil action will not, in the absence of express statutory authority, lie to enforce a right created by statute. Thus, it has been held that a civil action will not, in the failure of express authorization in the statute, lie to



recover an unpaid license fee accruing to a state or municipality, although the act for which the fee is imposed has already been performed. State ex rel. Cosson v. Shores-Mueller Co., 182 Iowa 501, 166 N.W. 62 (1918); State of Montana v. Ball, 53 Mont. 162, 162 Pac. 385 (1917); Town of Gallup v. Gallup Cold Storage Co., 26 New Mexico 253, 191 Pac. 465 (1920). These cases, however, may be distinguished on the ground that payment on the fee is a prerequisite to the obtaining of the license. As stated by the court in Scranton v. Honsen, 163 Iowa 457, 144 N.W. 1024 (1914), where defendants were carrying on business as transient merchants without having paid the license fee:

"there was no license. There was no time that defendants had protection, and there was therefore nothing for which they should pay. Requiring payment now would be in the nature of punishment. We think there was no debt owing from defendants to the city."

Under the licenses issued pursuant to Section 8 (3) of the Agricultural Adjustment Act, all distributors who engage in the milk business are licensed automatically and there is therefore an immediate obligation to pay the monies when levied, to the Market Administrator. See also United States v. Jourden, 193 Fed. 986 (1912).

Other cases recognize the obligation to pay a fee independently of whether or not a license is obtained, but deny the right to bring civil suit for the fee on the ground that the statute or ordinance prescribes other exclusive remedies. See Alaska Mexican Gold Mining Co. v. Territory of Alaska, 236 Fed. 64 (1916). Thus, where a municipal act imposing a license fee provided no means of collection, the court allowed an action of debt to collect the fees. City of Philadelphia v. Atlantic & Pacific Telephone Co., 109 Fed. 55 (1901).

Although the payments required under the license are not taxes, the obligation to pay imposed thereby is, like a tax, an obligation imposed by law. A decision that a tax may be recovered in a civil action despite the lack of express statutory authorization would therefore be persuasive that the levy here under discussion is similarly recoverable. A tax, if a personal obligation, is recoverable in a civil action even if the tax statute makes no provision for such suit. City of Enterprise v. Rawls, 204 Ala. 528, 36 So. 374 (1920); Marion County v. Woodburn Mercantile Co., 60 Ore. 367, 119 Pac. 487 (1911); Pinnacle Gold Mining Co. v. People, 58 Col. 86, 143 Pac. 837 (1914). In fact, in United States v. Chamberlin, 219 U.S. 155 (1911), a civil action of debt was allowed to recover the amount of a stamp tax notwithstanding the fact that penalties were provided in the Act for non-compliance therewith.

2. The provision made by the Act for revocation of a license in the event of failure to comply with the terms or conditions thereof (Sec. 8 (3)) is not exclusive of a civil action to recover an assessment required by the license.

Section 8 (3) provides:

"The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. \* \* \* Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than \$1,000 for each day during which the violation continues."

In view of the fact that license revocation is a remedy widely removed from an action for money due, a court will probably be reluctant to hold the remedy by revocation exclusive, unless the statute clearly indicates such an intention. In Miller v. Johnson, 110 Kans. 135, 202 Pac. 619 (1921), a Kansas statute authorized a state board of embalmers to make rules regulating the embalming of dead human bodies and to issue licenses for the practice of embalming to qualified persons. The statute furthermore provided a fine for the violation of any rule made by the board. Upon violation of one of its rules, the board sought to revoke the license of the violator. The defense was presented that the statutory fine constituted an exclusive remedy, inasmuch as no statutory provision had been made for the revocation of the license. The court rejected this argument, noting especially the variance in effect of the two remedies.

Furthermore, it should be borne in mind that the penalty provided for in Section 8 (3) of the Agricultural Adjustment Act is not a remedy for the violation of a term or condition of a license, but is imposed only in case a person engages in the handling of commodities or products after his license has been revoked. Thus, a party may habitually violate a license by failing to pay an assessment without being subject to the penalty unless his license is revoked and he thereafter continues to do business. Resort to a somewhat cumbersome administrative machinery should not be required in a situation where immediate collection is desirable and where the license infraction may be a minor one not warranting complete forfeiture of the license.

As noted above, the obligation to pay money to the Market Administrator which the license imposes may be likened to a tax. It is here unnecessary to make an analysis of the conflicting judicial decisions involving the right to bring a civil action for a tax where other remedies are provided in the statute. See 41 L.R.A. (N.S.) 730. However, in United States v. Chamberlin, 219 U.S. 155 (1911), the Supreme Court apparently settled the rule for that court. The case involved an action by the United States to recover the amount of a stamp tax levied upon the execution of a conveyance. Although the court found in certain provisions of the Act express authorization to bring suit to collect the tax, it clearly declared that a civil action lay independently of statutory authorization. Furthermore, the penalties provided in the Act for non-compliance therewith were not exclusive of collection of the amount by civil suit. In answering the contention that they excluded



the idea of a personal liability, the court declared that the penalties were provided in order to induce the payment of the tax, and not as a substitute for such payment. In like manner, the remedy of revocation is here a means to enforce compliance with the terms of the license and not a substitute for payment. The court in the Chamberlin case, in emphasizing the fact that revenues were necessary to the existence of the Government, declared that there would not be implied an intention on the part of the legislature to make a remedy exclusive upon failure of a person to pay a tax, where such remedy would fail to enforce payment. Similar considerations of policy are applicable to payments under licenses. The scheme contemplated by Section 8 (3) of the Agricultural Adjustment Act is to a considerable extent dependent upon the obtaining of revenue from licensees. A court may well hesitate to declare exclusive a remedy, where the effect of such a decision would be to deprive the Market Administrator of needed monies.

Certain of the license fee cases might tend to cast doubt on the conclusion above stated. United States v. Jourden, 193 Fed. 986 (1912), for instance, held that the statutory remedy of fine or imprisonment for the selling of liquor without the payment of a license fee excluded a civil action by the United States to recover said fee. However, as pointed out, in these cases the payment of a fee is a condition precedent to the obtaining of a license. In the words of the court in United States v. Jourden, *supra*:

"The defendant in error is not indebted to the government. He has not complied with the terms upon which he could acquire the right to conduct a wholesale liquor business. He has conducted an illegal business, and has done acts prohibited by law, and for those acts the statutes prescribe but one remedy--the criminal prosecution and punishment of the offender." (p. 988)

In the present case, the obligation to pay to the Market Administrator attaches concurrently with the issuance of the license and the doing of business. Payments are not conditions precedent to the securing of a license. Therefore, the situation here presented comes within the rule as to exclusiveness of remedies applied in the tax cases, and not within the rule as found in the license fee cases.

The case of Alaska Mexican Gold Mining Co. v. Alaska, 236 Fed. 64 (1916), where apparently payment of a license fee was not a condition precedent to the obtaining of the license, is more difficult to distinguish. The defendant (plaintiff in error on appeal) had operated a mining company without having paid the license tax required by the Laws of Alaska 1913, c. 52. This act made the operating of a mining company without a license a misdemeanor and provided penalties therefor. Under the laws of Alaska 1915, c. 76, it was provided that the special remedies provided by the laws of 1913 should not be deemed exclusive. The territory of Alaska brought suit against the mining company for the license fee for doing business before the enactment of the laws of 1915. The court, in allowing recovery of the license fee, declared:

"It may be assumed that under the laws of 1913 the only way the territory had to enforce the duty to pay was by conviction of misdemeanor after failure to pay, and, upon continuing failure to pay, by judgment to collect as in civil suits. But the duty to pay having existed, remedy for the enforcement of the duty or obligation could be provided by legislation subsequent to the time when the duty arose; or if when the duty arose there was a remedy, but it was exclusively confined to criminal prosecution and judgment thereafter, such remedy could be changed or enlarged by subsequent legislative action, or additional remedy could be given, without impairing the rights of the plaintiff in error." (p.67)

That remedies **other** than a civil suit for the fees were held exclusive under the Alaska Laws of 1913 does not necessarily imply that the remedy of revocation is here exclusive. In the Alaska Gold Mining Company case the obtaining of monies necessary for administrative expenses was not the primary consideration that is here the case. In addition, the remedy of a penalty brought into the treasury of the territory an amount of money which substantially covered the loss of the license fee. The remedy of license revocation, on the other hand, brings in no revenue to the Market Administrator.

Finally, it should be noted that courts are reluctant to declare a statutory remedy non-exclusive, if the remedy is inadequate to carry out the purpose of the statute. Thus, in Pinnacle Gold Mining Co. v. People, 58 Col. 86, 143 Pac. 837 (1914), the court passed on a state statute imposing annual taxes upon corporations and providing that non-payment of the taxes should work a forfeiture of the corporation's franchise. The court, in denying the defendant's plea that the remedy of forfeiture was exclusive, declared:

"It was not the design of the Legislature to put corporations out of business, but to get revenue from them. The authorities are not in accord, but it seems to us that the better way to dispose of it is to say that, if the special remedy provided by the statute for the collection of the taxes is not effectual to compel the payment in spite of the taxpayer's determination not to pay, then resort may be had to an action against the taxpayer; \* \* \*." (p.839)

- "3. 5 U.S.C.A. § 327, providing that suits by the United States for "revenues and debts due and accruing to the United States" must be brought in manner specified by the Solicitor of the Treasury with the approbation of the Attorney General, is not here applicable.



5. U.S.C.A. § 327 provides that:

"The Solicitor of the Treasury shall establish such regulations, not inconsistent with law, with the approbation of the Secretary of the Treasury, for the observance of collectors of the customs, and, with the approbation of the Attorney General, for the observance of district attorneys and marshals respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers, and the prompt collection of all revenues and debts due and accruing to the United States. This section shall not apply to suits for taxes, forfeitures, or penalties arising under the internal-revenue laws. (R.S. § 377.)"

On the basis of this provision, an argument might be presented to the effect that a suit for payments under the licenses must be under the direction of the Solicitor of the Treasury. This would be on the theory that the monies payable to the Market Administrator are revenues or debts due and accruing to the United States. The absence of judicial decisions interpreting this section of the Code prevents an authoritative statement as to its applicability, but a consideration of the nature of the payments required by the licenses would seem to negative the Code provision's relevancy. The payments to be made by distributors to the Market Administrator under the milk licenses are for three purposes. Deductions are made by distributors from the producer's price, which are used by the Market Administrator in part to meet the cost of operation and in part to secure certain benefits, such as checking weights and tests, to producers. Other payments by the distributors to the Market Administrator are for the purpose of effectuating the market pool or adjustment fund plan intended to equalize payments among producers. The payments are not for the purpose of meeting general governmental expenses, but are primarily for the benefit of the contributing parties and incidentally for the benefit of the general public. Furthermore, the payments are made to the Market Administrator, and not into the general treasury. The monies do not, under these circumstances, seem to be within the purview of a provision relating to "revenues and debts due and accruing to the United States."

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No. 36

BANKHEAD ACT ALLOTMENTS TO  
STATE INSTITUTIONS

Under the Act of April 21, 1934 (Bankhead Act) allotments should be made to State penal institutions engaged in the production of cotton, whether they are engaged in ginning or not.

Opinion Section Memorandum No. 67  
Dated April 27, 1934.



April 27, 1934.

MEMORANDUM TO MR. COBB.

In re: Bankhead Act; Effect on State  
Institutions.

This is in reply to Mr. Watkins' memorandum to me dated April 24, requesting an opinion as to whether or not, under the above Act, allotments should be made to State institutions, such as State penal institutions, which are engaged in the production of cotton.

The tax provided for in the Bankhead Act is upon the act of ginning, and not upon the production of cotton. Consequently, unless the courts should construe the Act as directly affecting the producers of cotton, it would seem that no State institution could raise the question of the interference of the Federal Government with a State instrumentality unless it was engaged in ginning. I understand that a considerable number of the State penal institutions do gin their own cotton. (As indicated above, it is, of course, possible that the courts may say this is designed to control production, and that regardless of the constitutionality of the Federal Government affecting production, it cannot affect the production by State instrumentalities.)

The principle of the doctrines controlling the relation between the Federal Government and State instrumentalities is immensely complicated and legalistic. The general rule is that if a State is launched in business, or engaged in other proprietary activities, such business or activities may be taxed by the Federal Government, whereas, insofar as the State is engaged in a governmental function, no tax by the Federal Government will be constitutional in the exercise of such function. No case of this kind can be decided without the specific facts governing the State organization's activities. For example, if the revenue derived by the State organization is paid into the general Treasury of the State, there is a strong likelihood that the courts will consider this an attempt on the part of the State to make money by business ventures and, consequently, to regard the activity as proprietary rather than governmental. On the other hand, if a State penal institution sells its products only to support itself, the chances are that the courts may hold this the carrying out of a governmental function and so immune from Federal taxation. None of these points in any given case can be settled with certainty without litigation.

I have conferred with Bureau of Internal Revenue representatives on this matter, and we agree that it would be useless to give you a general opinion and impracticable to attempt to cover each State institution that might be involved. The point will be sufficiently doubtful in so many cases that it seems wise for your Section to proceed on the assumption that penal institutions engaged in the production of cotton should be given allotments whether they be engaged in ginning or not. It will then be up to the Bureau of Internal Revenue to settle the particular cases as they arise.

Alger Hiss,  
Assistant to the General Counsel.



No. 32

TRANSFER OF FUNDS TO FEDERAL TRADE

COMMISSION FOR MILK INVESTIGATION

The Secretary of Agriculture has power, under Section 8(3) of the Agricultural Adjustment Act, to conduct an investigation into alleged price cutting practices by milk dealers.

Under Section 601 of the Economy Act of 1932 the Secretary may call upon the Federal Trade Commission to conduct such investigation and may, upon request of the Commission, pay for the estimated cost of the same by check drawn upon the funds appropriated by the Agricultural Adjustment Act.

Opinion Section Memorandum No. 76  
Dated April 30, 1934.



April 30, 1934.

MEMORANDUM TO MR. PRESSMAN

In reply to your inquiry I submit herewith my opinion upon the following:

QUESTION

May the Secretary of Agriculture transfer to the Federal Trade Commission, for the purpose of investigating price cutting practices by milk dealers in the Chicago area, a part of the funds appropriated by the Agricultural Adjustment Act?

OPINION

Such an investigation is within the powers of the Secretary under Section 8 (3) of the Agricultural Adjustment Act, and, under Section 601 of the Economy Act of 1932 the Secretary may call upon the Federal Trade Commission to conduct such investigation and may, upon request of the Commission, pay for the estimated cost of the same by check drawn upon the funds appropriated under the Agricultural Adjustment Act.

Pertinent Provision of the Economy Act of 1932 (47 Stat. 382, Section 601) 31 U.S.C.A. Section 686

Sec. 601. Section 7 of the Act entitled "An Act making appropriations for fortifications and other works of defense, for the armament thereof, and for the procurement of heavy ordinance for trial and service, for the fiscal year ending June 30, 1921, and for other purposes", approved May 21, 1920 (U. S. C., title 31, sec. 686), is amended to read as follows:

"Sec. 7. (a) Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon the furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau, or office as may be requisitioned; but proper adjustments on the basis of the actual cost

of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned; Provided, however, That if such work or services can be as conveniently or more cheaply performed by private agencies such work shall be let by competitive bids to such private agencies. Bills rendered, or requests for advance payments made, pursuant to any such order, shall not be subject to audit or certification in advance of payment.

"(b) Amounts paid as provided in subsection (a) shall be credited, (1) in the case of advance payments, to special working funds, or (2) in the case of payments ~~other~~ than advance payments, to the appropriations or funds against which charges have been made pursuant to any such order, except as hereinafter provided. The Secretary of the Treasury shall establish such special working funds as may be necessary to carry out the provisions of this subsection. Such amounts paid shall be available for expenditure in furnishing the materials, supplies, or equipment, or in performing the work or services, or for the objects specified in such appropriations or funds. Where materials, supplies, or equipment are furnished from stocks on hand, the amounts received in payment therefore shall be credited to appropriations or funds, as may be authorized by other law, or, if not so authorized, so as to be available to replace the materials, supplies, or equipment, except that where the head of any such department, establishment, bureau, or office determines that such replacement is not necessary the amounts paid shall be covered into the Treasury as miscellaneous receipts.

"(c) Orders placed as provided in subsection (a) shall be considered as obligations upon appropriations in the same manner as orders or contracts placed with private contractors. Advance payments credited to a special working fund shall remain available until expended."

## DISCUSSION

### (1)

An investigation of practices relating to milk prices is within the discretion of the Secretary in connection with the exercise of the power to issue licenses under Section 8 (3).

(1) Section 8 (3) of the Agricultural Adjustment Act empowers the Secretary to issue licenses to those engaged in the handling of agricultural commodities. Such licenses must be subject to such terms and conditions as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy of the Act and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. No express provision is made for hearings or investigations of any kind preliminary to the issuance of such licenses. It is true that Section 8 (2) requires a hearing prior to entering into a marketing agreement, but a license may be issued independently of the execution of any marketing agreement, and therefore compliance with the requirement for hearing in Section 8 (2) does not assure a proper factual basis for the



issuance of licenses in all cases. That facts concerning existing trade practices and their effects must be available before licenses can be intelligently formulated is apparent. That the Secretary as the head of the Department charged with the performance of public duties of great magnitude, such as those prescribed in this Act, is empowered to use such means as are reasonably necessary for their effective performance is in accord with principles long affirmed by the courts. See In re Neagle, 135 U.S. 1, 65-67 (1890); U. S. v. Maurice, Fed. Cas. No. 15747, P. 1214 (1823); U. S. v. Schlierholz, 133 Fed. 333, 335 (1904); 21 Op. Atty. Gen. 1 (1893).

Licenses designed to eliminate "unfair practices or charges" necessarily require consideration of practices relating to prices, and, in particular, of destructive retail price-cutting which tends to prevent the restoration of normal marketing conditions and the assurance of a fair return to the producer. Furthermore, the legislative history amply demonstrates that Congress contemplated the use of licenses as a means of correcting such practices when detrimental to the interests of producer and consumers. Hearings, Senate Committee on Agriculture, pp. 11, 15, 79. Inquiries of this character, whether they are conducted by hearings, or by investigations in the field, or by other appropriate means, must therefore be regarded as within the discretion of the Secretary as a necessary incident to the execution of the powers conferred to issue licenses. A license is at present in effect in the Chicago area in which the proposed investigation is to be made. License No. 30, issued February 3, 1934. It is, however, within the power of the Secretary to terminate or to modify the license, and in the exercise of this power his discretion must be guided by the conditions prevailing in the market during the operation of the license, and their effects upon consumers and producers alike.

(2)

The Federal Trade Commission being equipped to conduct an investigation of this character, the Secretary of Agriculture may, under the provisions of Section 601 of the Economy Act of 1932, call upon the Federal Trade Commission to perform such service.

When money is specifically appropriated to one department or establishment of the government for certain purposes, it is the general rule that it may not, in the absence of express statutory authority, be transferred for disbursement to another department or establishment, even though that other be equipped and willing to undertake the service. See 17 Comp. Dec. 174, 175 (1910); 7 Comp. Dec. 706, 707 (1901).

No satisfactory authority for such transfer can be found in the Act itself, unaided by other statutory provisions. Section 12 (c) provides:

"The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title."

The language is not clear as to whether the Treasury Department is to be regarded as an agency. It is first referred to in conjunction with the phrase "other agencies", indicating that it was so regarded, and later in the phrase "such department or agencies", which would imply a distinction. In any event the duties of the Treasury Department with reference to the administration of the Act are prescribed elsewhere in the statute, and Section 12 (c) does not directly authorize the Secretary to treat other federal departments or establishments as agencies for the purposes of the Act. Section 10(a) which authorizes the Secretary to appoint officers, employees and experts necessary to execute the functions vested in him by the Act is clearly limited to the appointment of personnel within the Agricultural Adjustment Administration. Section 10(b) authorizes the establishment of local committees or associations of producers and permits the use of cooperative associations as agents of their members and patrons in connection with the distributions of rental and benefit payments. Such committees and associations are undoubtedly "agencies" within the meaning of Section 12 (c) authorizing transfers of funds. That the Secretary is not limited to such agencies but may create or appoint others, when appropriate to the administration of the Act may be conceded, but such implied authority does not on general principles extend to the appointing of other, independent establishments of the federal government, with duties fixed by law, to act in such capacity. As stated in 17 Comp. Dec. 174 (1910), relating to a proposal to transfer funds from one branch of the government to another where the work provided for could be conveniently combined:

"The mere consent of one department or another establishment to surrender its rights, and of another to assume the correlative duties and obligations, arising under an act of Congress, cannot be permitted to defeat the clearly expressed will of Congress." (p. 175)

Viewed, however, in conjunction with Section 601 of the Economy Act of 1932, Section 12(c) does serve as authority for transfers of funds to other federal establishments as well as to those specified or implied by the terms of the Agricultural Adjustment Act standing alone.

Section 601 of the Economy Act amends a provision of the fortification act of 1920, which read: (41 Stat. 613, Section 7)



"Whenever any Government bureau or department procures, by purchase or manufacture, stores or materials of any kind, or performs any service for another bureau or department, the funds of the bureau or department for which the stores or materials are to be procured or the service performed may be placed subject to the requisitions of the bureau or department making the procurement or performing the service for direct expenditure . . . ."

Whether, and to what extent, this statute actually authorized the rendition of services by one department or independent establishment to another, it is not necessary to consider, in view of the amendment made by Section 601 of the Economy Act of 1932 (quoted on page 1). By this the head of any executive department or establishment is expressly authorized to place an order with any other such department or establishment for service of any kind that such other agency is equipped to render.

That the Federal Trade Commission is peculiarly equipped to conduct an investigation into retail price practices needs no argument. The investigation of business practices constitutes a major part of its functions and duties under the Federal Trade Commission Act (see Section 6, 15 U.S.C.A.), and requires the maintenance of offices in various sections of the country and the employment of a highly trained staff to conduct such investigations. Numerous investigations recently undertaken by the Commission deal with the practices of particular industries with regard to price, or with price-setting methods generally, sometimes with and sometimes without special reference to alleged violations of the Anti-Trust Laws. See Federal Trade Commission Annual Report (Fiscal Year Ended June 30, 1932) pp. 255 - 259.

To requisition the service of an agency thus amply equipped for the purpose contemplated, it is only necessary that the Secretary of Agriculture determine that it be "in the interest of the Government so to do."

Under Section 601 of the Economy Act, the Comptroller General has accordingly approved a proposal whereby the Public Debt Service of the Department of the Treasury should handle the bonds authorized under the Home Owners Loan Act of 1933 to be issued by the Home Owners Loan Corporation. Comp. Gen. A-52017, November 15, 1933. The proposed arrangement, which was agreeable to both agencies, involved additional salaries and expenses in the Public Debt Service. It promised, however, because of the existing equipment and established practice of the Public Debt Service, to be more economical than the handling of the bonds by the corporation directly. The Comptroller regarded the service as work performed by one agency of the government for another as contemplated by Section 601 and saw

"no objection to the handling of the funds either through a special working fund or by reimbursement to the appropriation or appropriations originally charged with the cost of the work, it being understood that the corporation is to be charged on the basis of the actual cost of the work to be performed for it."

Similarly, the Comptroller has approved a proposal to pay the Army and Navy Departments, pursuant to inter-departmental agreements, for expenses incurred by the use of Army and Navy aircraft by certain officials of the Government. Comp. Gen. A-5 1969, November 24, 1933. The scope of the payments authorized was thus stated:

"Under the terms of Section 601 (a) of the Economy Act . . . it is for determination and agreement by the departments or officers concerned whether the actual cost of departmental work shall include only additional expenses directly incident to the services performed under the rule in force prior to the decision of November 11, 1932, supra, or whether there should be included, also, as items of cost the salaries of regular personnel performing the service and other regular expenses which would be chargeable in any event to the performing department."

It may be contended that the proposed investigation is one within the scope of the functions of the Federal Trade Commission itself, and that, since Congress must be deemed to have provided for the proper functioning of the Commission to the full extent intended in the appropriations for it, no transfer can be made from the funds of other departments since to do so would augment the appropriation for the work of that agency beyond the amounts intended by the Congress for use in its functioning.

It is not disputed that the Federal Trade Commission is empowered upon its own initiative to conduct an investigation similar in character to that which the Secretary of Agriculture now contemplates. The latitude which the Commission enjoys as to the subject matter of investigations to be undertaken is, however, very wide, and the appropriations available to it are very limited, thereby requiring the Commission to narrow its selection of subject matter, rejecting much that is appropriate for study. Were an investigation into milk prices specifically required of the Commission, and an appropriation therefor at the disposal of the Commission, it might well be that such funds might not be augmented by the transfer of funds from other agencies not expressly made available for such purpose. In fact, however, no such investigation is required to be made, nor has any such investigation been authorized or directed by the Commission itself. The proposal is not to ask the Commission to undertake an investigation specifically required of it but to requisition the Commission, as an agency equipped



to render service of a particular character, to perform a service for the Secretary of Agriculture which the Secretary is authorized to undertake under the terms of the Agricultural Adjustment Act; and the request is justified by the fact that the investigation can be conducted more economically through the Commission than through the personnel and equipment directly under the Secretary or through private agencies.

A recent decision of the Comptroller which may present superficial difficulty, should be distinguished. Comp. Gen. A-54, 921, April 13, 1934. This dealt with a proposal to use funds appropriated by the Agricultural Adjustment Act to pay the cost of moving the activities of certain other federal establishments from a federal warehouse in order to permit the occupancy of the same by the benefit contract units of the Agricultural Adjustment Administration. The proposal was disapproved because another appropriation was available for the purpose. The other appropriation is apparently one which can be used for all federal departments and establishments, without distinction, for moving expenses in the District of Columbia. 48 Stat. 101, 295. The problem presented to the Comptroller, therefore, was not that of a transfer from one federal establishment, having funds for a certain purpose, to another agency having funds available for the same purpose; and the Comptroller's decision represents merely an application of the rule that when an appropriation is made for a specific object it is exclusive, and more general appropriations cannot be applied to that object.

It is my conclusion, therefore, that Section 601 of the Economy Act authorizes the Secretary to call upon the Federal Trade Commission to conduct the investigation proposed, that the Federal Trade Commission in performing such service will constitute an "agency" within the meaning of Section 12(c) of the Agricultural Adjustment Act, and that the transfer of funds by the Secretary to the Commission for this purpose is authorized both by Section 601 of the Economy Act and by Section 12(c) of the Agricultural Adjustment Act.

(3)

#### Procedural Points

By the terms of Section 601 payment for the estimated cost of the service to be performed may be made by check in advance, upon the written request of the agency requisitioned, to cover all or part of such estimated cost as determined by such agency.

When payment is made in this manner, the amount is to be credited to special working funds, which the Secretary of the Treasury is required to establish as may be necessary. Section 601 (b).

The statute provides that the department or establishment requiring service shall place "orders" with the agency requisitioned, and that adjustments as to charges may be made by agreement. The Comptroller has advised, in the case of a request to transfer funds from one agency to reimburse another for the salary of an employee loaned to the first, that such service may be regarded as a mere accomodation, unless there be a written order or agreement in advance signed by the responsible administrative officer of the department to be charged. Such order or agreement should be attached to the request for transfer of appropriations. Comp. Gen. A-53791, March 2, 1934.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.

No. 36

ALLOTMENTS UNDER BANKHEAD ACT --

LONG STAPLE COTTON

In determining the allotment to be made to a state under Section 5(a) of the Bankhead Act, or in apportioning such allotments to counties under Section 5(b) or to farms under Section 7(a), no account should be taken of the previous production of long-staple cotton.

Opinion Section Memorandum No. 77  
Dated May 3, 1934.

See also Opinion of the Attorney General dated May 23, 1934, in the Appendix. (A-5).





May 3, 1934.

Dear Mr. Cobb:

Pursuant to your inquiry of April 23rd, I reply as follows:

#### QUESTION

In determining the allotment to be accorded to Arizona under Section 5(a) of the Bankhead Act, is it proper to deduct the average production of long staple cotton from the total average production of Arizona for the base period, or is long staple cotton to be included in the total average production of Arizona for this purpose?

#### OPINION

No account should be taken of the previous production of long staple cotton in making allotments to the States under Section 5 (a) or in apportioning such allotments to the counties under Section 5(b) or to farms under Section 7(a).

#### DISCUSSION

The legislative history of the provision throws little light on the question. The provision exempting long staple cotton from the tax (Section 4(e) (4) ), came into the bill by amendment from the floor of the Senate; no reference is, therefore, made to it either in the House or the Senate report. In the House at the conference (H. Report No. 1239) the managers said merely: "This amendment exempts from the tax all cotton having a staple of 1 1/2 inches or longer."

However, the text of the Act indubitably supports the proposition that long staple cotton is not to be included in any of the calculations determining the allotments to be made under the Act.

Section 4(e) of the Act provides:

"No tax shall be imposed under this Act with respect to ..... (4) Cotton having a staple of one and one half inches in length or longer".

It is clear that long staple cotton is distinguished by this section from the ordinary cotton which is subject to the allotment and exemption plan, in that it may be produced and marketed without restriction free of taxation without need for the use of exemption certificates.

Another persuasive argument for the position that Congress must have meant that long staple is in a category entirely different from ordinary cotton subject to the allotment-exemption plan may be adduced from the manner in which the provision relating to long staple is introduced in the Act:

"4. (e) No tax shall be imposed under this Act with respect to --

(1) Cotton harvested by any publicly owned experimental station or agricultural laboratory.

(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

(3) Cotton harvested prior to the crop year 1934-1935.

(4) Cotton having a staple of one and one half inches in length or longer."

It follows from the fact that the section on long staple cotton is separate from that referring to ordinary allotted and exempted cotton that Congress regarded the two types of product as totally distinct and that calculations relating to the one are irrelevant to those concerning the other.

That Congress assumed that long staple cotton would not be confused with cotton under the allotment and exemption system set up under the Act may also be seen from the fact that no provision at all is made for the marketing of this product under Section 10 (c), which specifies the manner in which cotton covered by the other exceptions to the main plan can be sold without taxation.

Not only does the Act as a whole show that long staple cotton is to be excepted from the provisions limiting cotton production, but the only reasonable reading of the provisions for allotment of tax exemption certificates does the same, because no tax exemption certificates need be issued to exempt long staple cotton from the tax.

The method of apportionment specified in Section 5 (a), provides:

"When an allotment is made, in order to prevent unfair competition and unfair trade practices in marketing cotton in the channels of interstate and foreign commerce, the Secretary of Agriculture shall apportion to the several cotton-producing States the number of bales the marketing of which may be exempt from the tax herein levied, which shall be determined by the ratio of the average number of bales produced in each State during the five crop years preceding the passage of this Act to the average number of bales produced in all the States during the same period \* \* \*".

The underlined words show that the "number of bales" spoken of are bales of cotton which are to be freed from taxation by exemption certificates; for to include in this apportionment to a state of a number of bales of cotton which may be exempt from the tax cotton having a staple of one and one-half inches in length or longer would make no sense as all cotton of such a staple length is exempt from the tax and clearly without the allotment restrictions. The provision for State allotments found in the same paragraph can use the term bales only with the same meaning, since it is settled that a phrase repeatedly used in a section will be presumed to bear the same meaning throughout unless there is something to show that there is another meaning intended. (People v. Eddy, 43 Cal. 331, 13 Am. Rep. 143 (1872); Ryan v. State, 174 Ind. 458, 92 N. E. 340 (1910)). It follows that the phrase "the average number of bales produced in each State during the five crop years" has the same meaning; that is, it refers to ordinary cotton to which the whole allotment program applies, and not to long staple cotton which is by Section 4 (e) (4), expressly taken out of the category of such cotton. Furthermore, all the other provisions for allotments and issuance of certificates cannot have reference to the long staple cotton grown. The rest of the allotment scheme is drawn in reference to the exemption under provision 4 (e) (2) and not 4 (a) (4). These provisions would make the introduction of long staple cotton into the calculations irrelevant.

To permit states to include long staple cotton in determining the averages fixing their allotment under the Act would have led to absurd results. It would follow that long staple growers, being counted as cotton producers under the allotment exemption program, would then be permitted to vote under Section 3 (a) which provides:

"When the Secretary of Agriculture finds, for the crop year 1935-1936, if the provisions of this Act are effective for such crop year, that two thirds of the persons who have the legal or equitable right as owner, tenant, share-cropper, or otherwise to produce cotton on any cotton farm, or part thereof, in the United States for each crop year favor a levy of a tax on the ginning of cotton in excess of an allotment made to meet the probable market requirements and determines that such a tax is required to carry out the policy declared in section 1, the Secretary shall ascertain from an investigation of the available supply of cotton and the probable market requirements the quantity of cotton that should be allotted, in accordance with the policy declared in section 1, for marketing in the channels of interstate and foreign commerce, from production of cotton during the succeeding cotton crop year, exempt from the payment of taxes thereon."

Long staple growers, whose product is subject to no restriction under the Act would then be entitled to a voice in the determination of the restriction program for ordinary cotton growers. Obviously any



premise which permits such a reductio ad absurdum must be carefully scrutinized. Rather the general design and purpose of the law is to be kept in view and the statute given a fair and reasonable construction with a view to effecting its purpose and object. (Chicago, etc. R. Co. v. Guffey 122 U. S. 561 (1887)). Such a conclusion can follow only from the postulate that long staple production is not to be included in any of the calculations pertaining to the exemption plan.

To include long staple cotton in determining the State average would lead not only to an arbitrary and inequitable result inconsistent with the purpose of the statute, but would read a flat contradiction into the Bill. Section 7 (a) of the Act provides:

"The amount of cotton allotted to any county, pursuant to Section 5 (b) shall be apportioned by the Secretary of Agriculture to farms on which cotton has been grown within such county. Such allotments to any farm shall be made upon application therefor and may be made by the Secretary based upon -

(1) A percentage of the average annual cotton production of the farm for a fair representative period."

If long staple cotton is to be included in calculating the average production of a State or County the average production of a farm should be determined on the same basis. There is no indication of grounds for differentiation between the kind of cotton which is to enter into the one calculation as distinguished from the other. The result would follow that a farm producing only long staple cotton would secure an allotment under the Act. Such an allotment would then not be given to relieve such a farmer from taxation on his own production as it would not be needed for the purpose. It would be rather an invitation to speculate in exemption certificates, a result which it is difficult to believe the Congress intended. The reasonable conclusion would seem to be, therefore, that long staple cotton may not be included in fixing the average production of a State for the purposes of this Act.

This conclusion is in keeping with the rules of statutory construction and law described below which requires that a reasonable interpretation must be achieved.

It is an established doctrine that the several provisions of a statute should be construed together in the light of the general purpose and objects of the Act and so as to give effect to the main intent and purpose of the legislature as therein expressed. (State Public Utilities Company v. Monarch Refrigerating Co., 267 Ill., 528, 108 N. E. 716. (1915), State v. Louisville & N. R. Co., 177 Ind. 583, 96 N. E. 340 (1911)). This principle of statutory interpretation would be defeated by a construction which permitted a State to add long staple cotton in determining its average under the apportionment plan. The purpose of the system as it is set up is to give to each State an



aliquot share of the cotton which is to be allotted and exempted under the Act. On a construction allowing the inclusion of the long staple cotton in the making up of a State's average, the bale allotment quota would be apportioned inequitably to the advantage of the State wherein such long staple cotton has been produced and to the corresponding disadvantage of a State not producing long staple. In short, as a result of this interpretation, a long staple producing State would have a larger allotment for cotton other than long staple, because its proportion would be based on all cotton heretofore produced therein. Such an inequitable result argues strongly against the interpretation which leads to it.

Finally, to interpret a section of the Bill in a manner which will give States producing this commodity an advantage over other States in the subject regulated would be to attribute to Congress arbitrary action. But it is settled doctrine that nothing but clear and unmistakable language will warrant a construction which will produce injustice by the unequal operation of the statute. (Lienberger v. Rouse, 9 Wall. 468, (1869) and Smith v. Townsend, 148 U. S. 490 (1893)). There is no warrant in the instant statute for such an interpretation.

Respectfully submitted,

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.



No. 32

REMOVAL OF SURPLUS

Under Section 12(b) of the Agricultural Adjustment Act appropriating money for the "removal of surplus agricultural products", the Secretary of Agriculture may advance funds to the War Department to enable that department to accept a higher bid for domestic beef rather than a lower bid for beef of foreign production.

Opinion Section Memorandum No. 71  
Dated May 5, 1934.





May 5, 1934.

MEMORANDUM TO MR. JOHN B. PAYNE

QUESTION

Is the supplementing of War Department funds by funds provided by the Secretary of Agriculture so that the War Department can accept a higher bid for domestic beef rather than a lower bid for beef of foreign production justified as a "removal of surplus agricultural products" under Section 12 (b) of the Agricultural Adjustment Act.

OPINION

It is my opinion that the Secretary of Agriculture may make such advances to the War Department for the purpose specified, but before doing so the question should be submitted to the Comptroller General.

DISCUSSION

I.

IT IS CLEAR FROM THE TEXT OF THE AGRICULTURAL ADJUSTMENT ACT THAT THE SECRETARY IS NOT LIMITED IN THE METHODS HE MAY EMPLOY FOR THE "REMOVAL OF SURPLUS AGRICULTURAL PRODUCTS".

Section 12, Subsection (a) of the Act appropriates funds

"for administrative expenses \* \* \* and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market".

Subsection (b) appropriates certain funds "in addition to the foregoing"

"for expansion of markets and removal of surplus agricultural products and the following purposes under Part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes".

Thus, the appropriations under Section 12(b) cover the same purposes as those under 12(a), but additionally it is authorized to be used "for expansion of markets and removal of surplus agricultural products" and for refunds on taxes. No limitation expressly appears as to the methods to be employed in expending the appropriation for removal of surplus agricultural products.

The authority to make expenditures for the removal of surpluses in 12(b) appears in conjunction with that for the making of rental and benefit payments. The machinery for the employment of the money appropriated for rental and benefit payments is specified in Section 8(1) of the Act. Clearly if action taken under this section for reduction in acreage or reduction in the production for market will effect a removal of surplus, the Secretary may bring about such a removal of surplus by the benefit or rental payment device. But can 12(b) be so interpreted as to limit the Secretary to such means? It seems clear that it cannot. The subsection appropriates funds to be used "for removal of surplus \* \* \* and \* \* \* rental and benefit payments". The word "and" must mean something additional. Montello Salt Co. v. Utah, 221 U. S. 452, 466 (1911). Its use makes it conclusive that there was no design to limit the Secretary to such means.

The other major powers given the Secretary, in addition to that authorizing agreements for rental or benefit payments, which may call for financing are the power to enter into marketing agreements and to issue licenses under Section 8(2) and (3). There is nothing in the Act to prevent the Secretary from incidentally effecting a removal of surplus by the exercise of these powers. But even more clearly is the Secretary in no way limited to these particular techniques for the removal of surplus. The "Appropriation" section makes no reference whatsoever to marketing agreements. And the Act elsewhere provides for the financing of such agreements, Section 8(2). The only use of the appropriation in connection with marketing agreements or licenses would be for payment of administrative expenses.

Thus, the Act not only contains no specific limitation as to the form in which the appropriation may be expended for removal of surplus, but no such intent can be implied by reference to the other sections.

Indicative of the fact that Congress did not intend to limit in any way the manner in which the Secretary might choose to bring about the legislative purpose of effecting a removal of surplus agricultural commodities, is the recent amendment to Section 12(a) of the Act by H. R. 7478. Section 2 of that bill authorizes to be appropriated moneys "to enable the Secretary of Agriculture to finance surplus reductions \* \* \* with respect to the dairy-and beef-cattle industries, and to carry out any of the purposes described in Subsections (a) and (b) of this Section 12". It authorizes appropriation of these funds to be used "under such terms and conditions as he may prescribe". This fortifies the conclusion that for the purpose of effecting removal of surplus, it is the consistent policy and purpose of Congress to leave the Secretary unhampered in his choice of method.

## II.

THE LEGISLATIVE HISTORY OF THE ACT GIVES NO INDICATION THAT THE MEANS FOR EFFECTING OF THE REMOVAL OF SURPLUS AGRICULTURAL COMMODITIES SHOULD IN ANY WAY BE LIMITED.

Throughout the debate on Section 12 (b) nothing appears with reference to how the money appropriated for the removal of surplus agricultural commodities should be employed. What the debate does make clear, however, is that the legislators certainly did not intend to limit the means by which the Secretary could effect a removal of surplus agricultural commodities to rental or benefit payments. They recognized that employment of funds for the removal of surplus might have the effect of lessening the amount of money available to the Secretary for the purpose of rental or benefit payments.

The original bill, as introduced, did not contain the words: "removal of surplus". It was amended to include the phrase, and it was specifically pointed out in debate on the amendment that its effect would be to possibly diminish the funds available for benefit payments (Congressional Record, 73d Congress, pp. 1957-1959).

This strongly indicates that Congress did not intend to limit the Secretary to the machinery specified in other Sections of the Act in carrying out the removal of surpluses, and that any appropriate means for the purpose was available to the Secretary.

## III.

AN OFFICER TO WHOM HAS BEEN DELEGATED POWER TO EFFECT A DECLARED LEGISLATIVE POLICY, IN THE ABSENCE OF LEGISLATIVE LIMITATIONS, MAY SELECT ANY APPROPRIATE MEANS TO ACCOMPLISH THE PURPOSE.

Whenever power is delegated by a legislature to an executive or administrative officer to effect a policy laid down by the legislature, the Courts consistently hold that the officer has the broadest discretion as to the means and methods to be employed to so effect the legislative purpose.

"Then the Legislature confers power in general terms upon an official body without prescribing the details for the exercise of that power, the courts will not be officious to interfere with the official body's discretionary methods of performing the public duty intended by the Legislature in granting such powers." State v. Younkin, 196 Pac. 620. (Kan., 1921).



This doctrine has long been established. It was enunciated as early as 1827 in the case of Martin v. Mott, 12 Wheat. 19, in which Justice Story stated:

"Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." (at p.30).

In that case, the authority of the President, under an Act of Congress, to call out the militia when in his opinion such action was required, was challenged. But the court held that the President's conclusion as to the existence of an exigency calling for the exercise of his power under the Act was vested in the President's own discretion and that his decision was conclusive. In like manner, if the Secretary of Agriculture should in this situation decide that the purchase of the beef from the domestic bidder will be an effective means for the removal of an agricultural commodity of which there is a surplus, then his decision to so effectuate the policy and purpose laid down by the Act would be conclusive.

"Acts done within the field of power marked out by Congress are controlled only by the judgment and discretion of those to whom the power has been granted". (U. S. v. Chemical Foundation, 294 Fed. 300. (Dist. Ct. Del., 1924), aff'd 5 Fed. (2) 191. (C.C.A. III), mod. on other grounds, and aff'd 272 U. S. 1.

When Congress legislates, it often does so only "as far as reasonably practicable" and "from the necessities of the case" is often "Compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." Buttfield v. Stranahan, 192 U. S. 470, 496, (1904). In that case, the Secretary of the Treasury was empowered by Congress to prevent the importation of unwholesome teas and it allowed him to fix certain standards. The court pointed out that by the Act the Secretary was invested with the "executive duty to effectuate the legislative policy declared in the statute." It even went so far as to state that whether the Secretary of the Treasury "failed to carry into effect the express purpose of Congress" by fixing wrong standards was not up to the courts to decide. It held the sufficiency of the standards to be committed entirely to the Secretary's judgment. Thus, any objection to the Secretary of Agriculture's action in the present situation, based upon the charge that the use of the funds here actually will not result in any effective reduction of surplus in beef, would be unavailing. The Secretary's judgment would be conclusive, in the absence of bad faith. (Buttfield v. Stranahan, supra).

Furthermore, there are many reasons why it is here especially desirable that the Secretary's conclusion as to the effectiveness of using certain means to bring about the result desired by Congress should govern. Similar reasons found expression in the case of



Hampton & Co. v. United States, 276 U. S. 394 (1928). There, the Tariff Act permitted the President to increase or decrease the imposed duties so as to equalize the differences which, upon investigation, the President found existed between the cost of domestic production and production in competing foreign countries. The court stated:

"\*\*Congress seems to have doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. To avoid such difficulties, Congress adopted \*\*\* the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing differences from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan."  
(At pp. 404, 405.)

In like manner in our situation Congress assumed that the Secretary of Agriculture was in a position, through accurate information in his possession, to best devise ways and means for effecting its purpose of reduction of surplus agricultural commodities. As was the situation in the Hampton Case, *supra*, it was readily foreseeable that changing conditions might necessitate employment of different methods by the Secretary. His decision as to the correct method to pursue as a practical matter must govern.

The debates on the recent amendment are pertinent to Congressional intent on the original bill, because the amendment authorizes appropriations for all the purposes of the original bill. Debate on these amendments makes it indisputable that Congress had in mind widest discretion for the Secretary in performing the duties imposed upon him.

"Mr. CONNALLY. I shall yield in just a moment. I cannot give the Senator any further assurances than I have already given him. Let me say this, however, to the Senator from Wyoming. Every grant of power carries with it a responsibility. That responsibility must be lodged somewhere. We cannot look into the future when we pass measures conferring powers upon departments of government, and put down in black and white just what shall be done. If we were to do that there would be no occasion to put the authority in anybody but ourselves. The Senator is bound to know that this question is so intricate that it cannot be worked out in advance and put down in the form of a statute. We must give the Secretary of Agriculture discretion, just like we give the head of a great corporation who is managing a business, discretion; we must give him the power to render decisions and to exercise his judgment to meet contingencies that are not foreseen. We cannot foresee what is

going to happen every day of the year and tie the hands of the Secretary and say, 'You have got to dot the "i" and cross the "t".' We must give him some authority so that when he meets a problem in the middle of the road, a problem no one knew was going to arise, we can trust his intelligence and his judgment and his honesty and his patriotism to do what he thinks the circumstances require." Congressional Record, March 6, 1934, p. 3889.

Nor does the particular method here contemplated of supplementing another Department's funds for the purchase of agricultural commodities as to which there is a surplus seem a method that would be held to be not contemplated by Congress. It would on the contrary bring about the desired result through a comparatively small expenditure of the appropriation, thereby avoiding the fears of those Congressmen who contended that the surplus removal program might too largely affect the benefit payment program.

Moreover, it conforms to the recently enunciated policy of Congress authorizing one department to place orders for services with another department, and make advances to such other department to pay for such services, where such cooperative action is in the interest of the government. (47 Stat. 382 Sec. 601; 31 U.S.C.A. 686).

It is therefore concluded that there is no inhibition which would prevent the Secretary from making these advances to the War Department for the contemplated purpose. This opinion does not purport to pass on the War Department's authority to accept a higher bid for domestic beef where a lower bid on a foreign product has been submitted. As to this authority however see 47 Stat. 73; and Public No. 42- 72nd Cong.

Francis M. Shea  
Chief of Brief and Opinion Section  
Office of the General Counsel

No. 40

CERTIFICATION OF EVIDENCE AT PROCEEDING  
FOR RATIFICATION OF LICENSE

The certificate of a presiding officer with reference to testimony taken at a hearing for revocation of a license under the Agricultural Adjustment Act, to the effect that the officer "believes that the transcript represents a true and correct report of the proceedings and of all the evidence offered and received at the hearings" serves virtually no useful legal purpose.

Opinion Section Memorandum No. 135  
Dated May 7, 1934.





May 7, 1934.

MEMORANDUM FOR MR. BACHRACH AND FOR MR. LEWIN

In accordance with your requests for an opinion with reference to certifications of evidence by the Presiding Officer upon hearings for revocations of licenses, I submit herewith the following memorandum.

QUESTION

(a) Is a certificate of a presiding officer with reference to the testimony taken at a hearing for revocation of a License under the Agricultural Adjustment Act, to the effect that the officer "believes that the transcript represents a true and correct report of the proceedings and of all the evidence offered and received at the hearings" a proper one?

(b) Is there any requirement for such a certificate in any form?

OPINION

(a) A certificate of evidence in the proposed form serves virtually no useful legal purpose.

(b) No certificate is required for the proceeding in question.

DISCUSSION

(a) There is little doubt but that the certificate here in question attached to the record is practically valueless.

The primary purpose of a certificate of evidence is to identify all of the evidence which was presented at the hearing. Teague v. Fortsch, 98 Ia. 92, 66 N. W. 1056, (1896). Without such a certificate, a reviewing court will not be in a position to review the evidence so as to modify or reverse a finding of fact.

"The purpose of this requirement of the law, \* \* \* is to secure such identification of the items of evidence offered and introduced upon the trial that no question

can fairly arise, upon appeal, as to what the evidence is". Teague v. Fortsch, supra, 11.W. at p. 1058.

It is thus seen that a mere statement that the presiding officer merely "believes" that the record is complete leaves a "question as to what the evidence is" and violates the fundamental purpose of such a certificate.

As the court stated in Taylor-Craig Corp. v. Hage, 69 Fed. 581 (C.C.A. 8th, 1895) in which the record was completed with the mere statement, "testimony closed":

"The record therefore not only fails to show affirmatively that it contains all the evidence produced at the trial, but it shows the contrary, as we think, in that it is manifest that, in making up the bill of exceptions, counsel only attempted to give a general summary of the evidence, without reporting the testimony in full or in detail. The rule is well established that whenever a litigant proposes to ask an appellate court to review the testimony, and to determine whether there was any evidence to warrant a recovery \* \* \* he should cause a statement to be inserted in the bill of exceptions showing affirmatively that it contains all the testimony that was heard or produced in the trial." (At p. 583.) (Underscoring supplied).

The court in that case, therefore, held that it could not consider a refusal to charge as requested at the trial, because the statement in question

"does not affirm, even by reference, that the bill contains all the evidence; and it is entirely consistent with the assumption that some evidence, either oral or documentary, has been omitted."

The situation would be the same where a presiding officer certifies that he merely "believes" that the record is complete. Such an expression of uncertainty would, in the words of the court in the Taylor-Craig Corp. case, supra, be "entirely consistent with the assumption that some evidence, either oral or documentary, has been omitted." Therefore, where a bill of exceptions, for instance, does not state that it contains all of the evidence, - or at least all of the material evidence - a reviewing court cannot consider exceptions based upon a finding of fact. Evans v. Middlesex County, 95 N.E. 897 (Mass. 1911). It will, on the other hand, conclude in such a circumstance that the trier of the facts may have been justified in making the finding on evidence not appearing in the record. York v. Barstow, 175 Mass. 167, 55 N.E. 846 (1900).

An "informal" certificate of evidence may be deemed sufficient, if it can be unquestionably gathered from it that all the evidence presented at the trial appears in the record. In Grand Lodge v. Ehlman, 246 Ill. 555, 92 N.E. 962 (1910), the appellant claimed that the appellate court could not review the facts because "there is not a sufficient certificate of evidence in the record." The certificate read as follows:

"This was all the evidence offered in the case, both on the part of the plaintiff and the defendant."

This certificate was signed by the court reporter and was marked "approved" by the trial judge. The court stated:

"This certificate is informal; but, in approving and signing the statement and certificate that the evidence was heard in the cause and was all the evidence offered, the judge did everything that was essential to preserve the evidence as a part of the record." (N.E. at p. 963) (Underscoring supplied).

The courts have, however, split upon the question of whether a certification to the effect that the record contains the substance of all of the testimony is sufficient. Some consider such a certificate valid. First National Bank v. Moore, 148 Fed. 953 (C.C.A. 9th, 1906); Webb v. Branner, 52 Pac. 429, 59 Kans. 190 (1898).

"It is, of course, true that, in order to enable this court to determine whether the evidence was such as to justify the trial court in submitting the case to the jury, the court must have before it all the evidence, and the bill of exceptions must show this; but we are of the opinion that a bill of exceptions, which is certified by the trial judge to contain the substance of all of the testimony given upon the trial, is sufficient to enable us to pass upon that question. A bill of exceptions and the certificate thereto should receive a reasonable interpretation, and, when the judge in settling the bill certifies that it contains the substance of all of the testimony admitted upon the trial, the presumption must be that nothing which was material to any of the exceptions taken is omitted therefrom." (First National Bank v. Moore, *supra*, at p. 958).

However, it is obvious that the same presumption cannot be made in favor of the certification that it is the "belief" that all the evidence appears in the record. Such a "belief" is entirely different from a flat certification that the record contains the substance of all the evidence. Furthermore, other courts even consider a "substance" certification insufficient. Gulf Co. v. Washington, 49 Fed.



347 (C.C.A. 8th, 1892); National Masonic Association v. Shayrock, 73 Fed. 774. (C.C.A. 8th, 1896).

"Whether it was sufficient to warrant a verdict on this issue for the plaintiff this court cannot say, because the 'substance' only of the testimony is embraced in the bill of exceptions, and we would not be willing to disturb the verdict of the jury, or hold that there was not sufficient evidence to support any given issue in a cause, upon the statement contained in the bill of exceptions in this case -- that the witnesses testified in 'substance' to what is therein stated. The opinion of the jury and of this court might differ widely from that of the parties or the court below as to what was the 'substance' of the witnesses' testimony. \* \* \* \* What is sent up as the evidence in the case must be certified to be all the evidence, and not the 'substance' of it, before this court can be asked to pass on the question of its sufficiency to support the verdict." (Gulf Company v. Washington, supra, at p. 353, Underscoring supplied).

The principal question, thus, is clearly one as to whether a reviewing court can review the evidence without the knowledge that the record contains all, - or at the very least omits no material part - of the testimony introduced at the hearing. A statement of "belief" that the record is complete would obviously not furnish a reviewing tribunal with any certainty that material evidence not appearing in the record had not been submitted. Such a certification, therefore, would serve little useful purpose.

(b) The further question here arises, however, as to whether any certificate whatsoever is necessary upon these hearings. Neither the statute, - Section 8 (3) - nor the pertinent Regulations - Series 3 - specifically require any certification at all. The Regulation merely states:

"Sec. 210 - Every such hearing shall be publicly conducted. Testimony given at such hearings shall be reported verbatim. As soon as practicable after the conclusion of every such hearing a copy of the transcript of testimony shall be available for public inspection in the office of the chief hearing clerk \* \* \*."

"Sec. 217 - As soon as practicable after the conclusion of any hearing, whether the hearing was attended by the licensee or not, the presiding officer shall make proposed findings of fact and shall report



the same to the Secretary together with his recommendations and the record of the proceedings."

In the absence of any such specific requirement for a certificate, none will be deemed necessary.

In Stephenson v. State, 179 N.E. 633 (Ind. 1932), an action was begun in one county and removed to another pursuant to the granting of a motion for a change of venue. Error was assigned on the grounds that the county court to which the trial was removed did not have jurisdiction because the transcript of the proceedings was not certified by the clerk of the court in which the action was then pending. The appellant claimed that the failure of the clerk to so certify resulted in there never having been a legal transcript. The statute merely required the clerk "to make a transcript of the proceedings" for the court of the proper county. The court stated:

"It will be observed that neither section 2239 nor section 2240 expressly requires the transcript to be certified, but only requires the clerk to make a transcript, which means a copy. Webster defines the word transcript as 'That which has been transcribed; a copy of any kind'. Worcester says it is 'a writing made from or after an original; a copy'. Burill defines it as 'a copy, particularly of a record'. Bouv. Law Dict., Vol. 3, p. 3308, as 'a copy of an original writing or deed'. Our own court defined the word transcript in the case of Mitchell et al. v. Beissenherz (1922), 192 Ind. 587, 135 N.E. 883, as follows: 'A transcript is what the name implies, a copy.'" (p. 637).

And it will be noted that Section 210 of the Regulations uses the same word, - "transcript" - and merely requires that a copy of the "transcript" of the testimony be filed.

The court in Stephenson v. State, supra, also pointed out that in other statutes of the state "when they (the Legislature) required a transcript to be certified, they used appropriate language to that effect" (p. 638). Likewise with reference to other administrative hearings, Congress has specified that under certain circumstances, a certification of the proceedings is necessary for other purposes. In this connection the situation with reference to the administrative hearings held by the Federal Trade Commission concerning "unfair methods of competition" is illustrative. Nothing more is required by the statute than that "the testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission." But with reference to enforcement of the order made by the Commission based on its findings of fact as a result of the hearing, the statute specifically provides that the Commission "shall certify and file a transcript of the entire record in the proceeding, includ-

ing all the testimony taken and the report and order of the Commission." (15 U.S.C.A. Sec. 45)

Likewise, the Interstate Commerce Commission is vested with power to enforce certain provisions of the Anti-trust Laws "where applicable to common carriers." Under the same statute, the Federal Reserve Board is given authority to enforce these statutes "where applicable to banks, banking associations, and trust companies," and the Federal Trade Commission "where applicable to all other character of commerce." (15 U.S.C.A. Sec. 21). With reference to the administrative hearings provided for under this statute, the only requirement again is that "the testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission." But as with the heretofore noted section of the Federal Trade Commission Act, to enforce the order based upon the hearing, a specific requirement of certification is imposed. The pertinent body must "certify and file a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board." (Sec. 21). Likewise, no specific requirement of certification appears in the statute with reference to hearings by the Interstate Commerce Commission under the Interstate Commerce Act. (49 U.S.C.A. Sec. 14).

Thus it appears that Congress has often indicated that such administrative hearings need not in the first place be certified at all. Where certification is subsequently deemed necessary, a specific requirement therefor is consistently made. As no provision for such certification anywhere specifically appears either in the Agricultural Adjustment Act or the appropriate Regulations, and as it is the consistent practice specifically to require such certification where deemed necessary, no certificate will here be presumed to be a requisite.

But even though no certificate is strictly necessary, so that the use of the certificate in question violates no requirement imposed by statute or regulation, the use of a certificate nevertheless may, as a matter of policy, be considered desirable. As the court stated in Stephenson v. State, supra:

"We do not desire to be understood by what we have said as discouraging the practice which has been very general in this state, of the clerk of the circuit court certifying to transcripts on change of venue, as we feel this is very good practice, but we cannot agree that the failure of the clerk to affix his signature to the certificate is essential to the legality of the transcript, where all the requirements of the statute have been satisfied." (At p. 638).

And if it is decided to have the transcript certified, only a certificate that is legally effective should be employed.

Francis M. Shea,  
Chief, Brief and Opinion Section,  
Office of the General Counsel.

No. 41

BENEFIT PAYMENT WITHOUT REDUCTION OF PRODUCTION

Under the Agricultural Adjustment Act, as amended, benefit payments may be made to a grower of sugar for the production of a quota adjusted to domestic requirements, regardless of whether such quota requires a reduction in production.

Opinion Section Memorandum No. 124  
Dated May 9, 1934.





May 9, 1934.

MEMORANDUM TO MR. BERNHARDT

I hereby submit my opinion on the following:

QUESTION

May benefit payments be made to an individual grower under a contract by which he undertakes to plant beets on a certain number of acres, allotted to him as his quota in a general plan of controlled production, irrespective of whether he thereby agrees to reduce the acreage planted below the average for the selected base period?

OPINION

Benefit payments may be made to a grower for the production of a quota adjusted to domestic requirements, regardless of whether such quota requires a reduction in production.

Discussion

By the terms of the Agricultural Adjustment Act, as amended by the Act of May 9, 1934 (the Costigan-Jones Act), it is provided that the Secretary of Agriculture may forbid processors, handlers of sugar, and others from marketing sugar from sugar beets produced in excess of certain quotas, the quota for continental United States being 1,550,000 short tons raw value. Section 8a (1) (B).

It is further provided that the Secretary shall determine the consumption requirements of the United States for 1934, and for each succeeding calendar year, and shall at intervals adjust these estimates. Section 8a (2)(A). When, during the course of any calendar year, it appears that the consumption requirements will exceed the requirements previously estimated the Secretary may prorate such excess on the basis of the quotas provided for in the Act, and, similarly, if it appears that the consumption requirements will be less than the requirements previously determined, the amount of such deficiency

may be proportionately deducted from such quotas. Section 8a (2) (B) and (C). By Section 8a (1) (B) and (C), the Secretary

"may, by orders or regulations, allot such quotas and readjust any such allotment, from time to time, among the processors, handlers of sugar, and others; and/or for any calendar year determine the quota ... for any area producing less than two hundred and fifty thousand long tons of sugar raw value during the next preceding calendar year ...."

Sugar beets and sugar cane are now included in the term "basic agricultural commodity" (Section 11 as amended) and therefore the producers of sugar beets are eligible for rental or benefit payments under the provisions of Section 8(1).

In accordance with these various provisions, and to make effective the quota system described, it is now proposed to work out allotments to individual areas or factory districts on the basis of a general formula based on the amount of sugar production per acre. While the details of this proposal are not fully outlined, it appears that the production of the area over a period of years will be used as a basis for determining the allotments. Because of variations in the production per acre due to climatic variations, crop rotation and other factors, the use of such figure may result in the allotment to an individual area of a quota in excess of any previous production for that area. It is further proposed to provide for benefit contract payments with producers who agree to devote a certain acreage, neither more nor less, to the production of sugar beets in accordance with the general allotment plan.

In my opinion the legality of a benefit payment to a grower entering into such a contract does not depend upon whether performance by the grower will entail a reduction in the acreage planted to sugar beets in the area covered by the contract. The benefit payments provided for in Section 8 (1) are not limited to those in connection with reduction in the acreage or reduction in the production for market, or both, of any agricultural commodity, "but are also permitted upon that part of the production of any basic agricultural commodity required for domestic consumption."

As originally introduced, Section 8 (1) provided only for reduction in acreage or reduction in production for market. This was amended in the Senate by the insertion of the phrase "or upon that part of any basic agricultural commodity required for domestic consumption." The report of the Conference Committee of the two houses contains the following statement on the change:

"Amendment No. 13: The House bill provided for

rental or benefit payments to be made only in connection with reductions in acreage or reductions in production for market or both. The Senate amendment provides that rental or benefit payments may also be made irrespective of any reduction in acreage or reduction in production provided the rental or benefit payments are limited to that portion of the production of the commodity that is required for domestic consumption. The House recedes." (Underscoring supplied)

That benefit payments are not conditioned upon reduction is therefore not only implicit in the language of Section 8 (1) but demonstrated by reference to the legislative history.

As has been indicated, the amended Act provides that the sugar quotas to be allotted by the Secretary are to be adjusted to "the consumption requirements of sugar for continental United States," or, in the language of Section 8(1), to the amount "required for domestic consumption." It may be conceded that the amendments to the Act contemplated a program involving reduction of production. Section 8(1) as amended, for instance, provides for payments, to compensate for reduced returns due to the processing tax, to be made to "producers who agree, or have agreed, to participate in the program for reduction in the acreage or reduction in the production for market, or both, of sugar beets or sugarcane." (Underlining added). But the amendments of Section 8 were professedly made with a view also to consumer protection (Section 8a (1)), for which it is essential that production, although reduced, shall not fall below consumption requirements at a reasonable price. It therefore cannot be said to be unreasonable to draft benefit contracts in such terms as will assure the production of a sufficiency, as well as prevent the production of an excess, of sugar beets.

The mere fact that the acreage which one grower accepts as his contract quota represents an actual reduction below the average for some base period, while that accepted by another grower represents no such reduction, is not objectionable. In either case the contract is supported by consideration, in the detriment to the promisee in the obligation to plant a certain number of acres and not to plant more. It is necessary that the entire scheme for which the benefit payments are authorized be designed to "effectuate the declared policy of the Act" which is broadly directed to establishing a balance between production and consumption, parity prices for agricultural commodities, and a just relation between consumer prices and returns to producers. It is not required that the scheme shall operate in respect to any individual producer in precisely the same manner in which it operates in respect to any other.

It should be stated, in conclusion, that we would not be understood in this opinion as going beyond the question actually submitted or attempting to pass generally upon the propriety of the allotment scheme tentatively outlined.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel



No. 42

GUARANTEE OF LOAN FOR EXPORT OF  
COTTON

Under Section 12 (b) of the Agricultural Adjustment Act, providing for the removal of surplus agricultural products, the Secretary of Agriculture may guarantee the payment of a loan to be made by the Reconstruction Finance Corporation to finance the export of surplus cotton to Bulgaria.

Opinion Section Memorandum No. 78  
Dated May 10, 1934.



May 10, 1934

MEMORANDUM TO MR. WARD M. BUCKLES, DIRECTOR OF FINANCE

In reply to your inquiry of April 21 addressed to Mr. Frank,  
I submit my opinion upon the following:

QUESTION

May the Secretary of Agriculture  
guarantee the payment of a loan to  
be made by the Reconstruction Finance  
Corporation to finance the export of  
surplus cotton for use in Bulgaria?

OPINION

Such guarantee is within the authority  
of the Secretary as an appropriate  
means of executing his power, under  
Section 12(b) of the Agricultural  
Adjustment Act, to provide for the re-  
moval of surplus agricultural products.

Discussion

Section 12(b) of the Agricultural Adjustment Act provides that:

"the proceeds derived from all taxes imposed  
under this title are hereby appropriated to be  
available to the Secretary of Agriculture for  
expansion of markets and removal of surplus  
agricultural products . . . ." etc.

It is our opinion, set forth in previous memoranda, that in  
exercising the power to remove surplus, for which funds are thus made  
available, the Secretary is not limited to methods elsewhere provided  
in the Act. See Op. Sect. Mem. Nos. 5 and 71.

Section 12(b) itself sets no limit upon the methods to be em-  
ployed by the Secretary in the use of funds for surplus removal. It  
is a well recognized principle that when an appropriation is made for  
a stated purpose, and the methods of accomplishing that purpose are  
not specified, the authority conferred includes authority to employ

all necessary and appropriate means to accomplish the prescribed object, including entering into contracts. See U.S. v. Maurice, Fed. Cas. No. 15747, at 1214 (1823); United States v. Tingey, 5 Pet. 114, 127 (1831); 21 Op. Atty. Gen. 1, 2 (1893); 19 Op. Atty. Gen. 650, 654, (1890); 6 Comp. Gen. 619, 621 (1927).

The consumption of American agricultural products in foreign markets is closely linked to the purposes of the Agricultural Adjustment Act. In Section 2 (1) it is declared to be the policy of Congress "to establish and maintain such balance between production and consumption of agricultural commodities" as will restore a parity price to producers, and in Section 2(2) it is specifically stated that equality of purchasing power is to be approached at as rapid a rate as is deemed feasible "in view of the consumptive demand in domestic and foreign markets." That one of the objects of the appropriation of funds for removal of surplus was to relieve the domestic market by seeking outlets abroad is clearly indicated in the Congressional debate upon this provision. 77 Cong. Rec. p. 1957.

In view of the complexity of the problem of removing surplus from the domestic markets it is clear that the administrator empowered to make expenditures for such purpose, must be clothed with wide discretion as to the means to be employed. That the Secretary is empowered by the Act to make contracts for outright purchases of surplus is not disputed; but such methods, however adequate for the purchase of supplies and the conduct of ordinary government business, will clearly not suffice to accomplish this program which contemplates the removal of exportable surpluses and the building up of foreign markets. The test of the means used must be their appropriateness for the object sought to be accomplished.

The present proposal contemplates that the Secretary shall guarantee the payment of certain bills of exchange. These bills are to be drawn by the American exporter of surplus cotton upon a consortium of Bulgarian banks, are to be accepted by the consortium, and unconditionally guaranteed by the Kingdom of Bulgaria. In effect the United States by the proposed arrangement becomes the ultimate guarantor of the obligation of the Bulgarian Government to the Reconstruction Finance Corporation. Section 5 of the Act creating the Reconstruction Finance Corporation, 47 Stat. 5 (1932), provides that all loans made "shall be fully and adequately secured." Whether the proposed guaranty satisfies the requirement of "full and adequate security" within the meaning of that act, we do not attempt to say. But it is our opinion that the Secretary of Agriculture, in his discretion, is authorized to execute such a guaranty, pledging funds made available under Section 12(b) of the Agricultural Adjustment Act, as a means of removing surplus.

It is true that the authority of the head of a department to make purchases and enter into contracts does not ordinarily carry with it authority to pledge the credit of the government as an accommodation



party. In The Floyd Acceptances, 74 U. S. (7 Wall.) 666 (1868), it was held that the Secretary of War, in accepting bills of exchange drawn upon him by contractors who had obligated themselves to furnish supplies to the Army, had exceeded his authority and that the United States was not liable thereon to purchasers for value.

On the facts the case is readily distinguishable from the present proposal. No necessity existed for the issuance of such paper upon unexecuted consideration to pay for the supplies contracted for, and the court held that in accepting the bill the Secretary undertook to make the United States acceptor for the sole benefit of the drawers. On the question of authority the test applied was that of the appropriateness of the means employed in carrying out the statutory duty.

Under the present proposal the liability of the United States as guarantor cannot arise except upon the removal of the cotton and the failure of the borrower to pay by the due date. The removal of the cotton is the object for which the guaranty is given, and that that purpose is public in character is established by the declarations of Congress in the Agricultural Adjustment Act. Contracts which are appropriate to the accomplishment of that purpose, moreover, are necessarily of a more varied character than those for the purchase of supplies for government use and must be deemed to include financing arrangements of any customary and appropriate character. Agreements by which the United States assumes primary liability for purchases affecting the desired removal are not barred, and no reason is perceived why the authority to enter into such agreements may not equally include, within the limits of funds available and set aside for the purpose, agreements by which the United States assumes a liability contingent upon the failure of the borrower to pay for goods purchased.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.



No. 45

DESIGNATION OF AGENT TO ADMINISTER

OATHS

Under the provisions of Section 521, 5 U.S.C.A., the Secretary of Agriculture may designate any officer, agent and/or employee of the Department to administer oaths and take affidavits for use in a prosecution or a proceeding under the laws committed to this Department for administration, or for use in the enforcement of such laws.

Opinion Section Memorandum No. 80  
Dated May 31, 1934.





May 31, 1934.

MEMORANDUM TO MR. CHRISTGAU

In response to your inquiry of May 21, 1934, based upon the memorandum of Mr. Geo. R. Wicker dated May 18, 1934:

IT IS MY OPINION that c. 124, Sec. 1, 43 Stat. 803; 5 U. S. C. A. 521, clearly authorizes the Secretary of Agriculture to designate any officer, agent and/or employee of the Department to administer oaths and take affidavits. If it is a convenient procedure it would be appropriate for the Secretary to designate field agents in charge of the offices of the Field Investigation Section and senior investigators of that Section to administer oaths and take affidavits.

It should be noted that under the terms of the statute officers or agents of the Department so designated may administer oaths or take affidavits only for use in a prosecution or a proceeding under the laws committed to this Department for administration, or in the enforcement of such laws. However, the specific purpose for which Mr. Wicker requests these designations would seem to be well within the terms of the statute.

Francis M. Shea  
Chief of Brief and Opinion Section  
Office of the General Counsel



No. 44

APPOINTMENT OF GOVERNOR TO ALLOT THE SUGAR  
QUOTA FOR PUERTO RICO

The Secretary of Agriculture is not authorized to appoint the Governor General of Puerto Rico to allot the quota of sugar fixed for Puerto Rico under the Agricultural Adjustment Act, as amended.

Opinion Section Memorandum No. 109  
Dated May 31, 1934.





May 31, 1934.

MEMORANDUM TO MR. OPPENHEIMER, ACTING ASSISTANT TO  
THE GENERAL COUNSEL

This is in reply to the first of the questions raised in your memorandum of May 22, 1934, as follows:

QUESTION

May the Secretary appoint the Governor-General of Puerto Rico to allot the quota of sugar fixed for Puerto Rico under the Agricultural Adjustment Act, as amended?

OPINION

The authority given to the Secretary to allot the sugar quota for Puerto Rico may not be delegated.

DISCUSSION

Section 8a (1) (A) (ii) of the Agricultural Adjustment Act, as amended, after making provision for sugar quotas for Hawaii and Puerto Rico, to be fixed by the Secretary of Agriculture, provides that

"the Secretary of Agriculture may, by orders or regulations, allot such quotas and readjust any such allotment, from time to time, among the processors, handlers of sugar, and others."

The question to be determined is whether the authority hereby confided to the Secretary of Agriculture to allot quotas may be validly delegated by him, in the case of the quota for Puerto Rico, to the Governor General of Puerto Rico. It is the general rule that a public officer may delegate such powers as are purely administrative or ministerial but that those which are discretionary in character must be exercised by him directly. Mechem on Agency (2nd ed.) Section 313; In re Triangle S. S. Co., 3 F. (2) 596, 895 (1924 C.C.A. 2nd); 35 Op. Atty. Gen. 15, 19 (1925). That the allotment of quotas is a duty requiring the exercise of discretion, in a high degree, we

think will be conceded in view of the effect of the allotment on the interests involved, and in view of the fact that no standard is provided in the Act to govern the allotment of the quota among the various processors and others, save the effectuation of the general policy of the Act and the special considerations set forth in the first paragraph of 8a(1). If then the authority to make such allotment may be delegated, it must be by virtue of provisions of the statute operating to take it out of the general rule.

Section 10(a) provides that the Secretary "may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title," and fixes the maximum salary to be paid "any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title." (Underlining added). The authorization to appoint officers "necessary to execute the functions vested in him by this title" suggests that Congress, recognizing the difficulty of requiring the Secretary to perform personally every duty requiring the exercise of judgment and discretion, intended to permit considerable latitude for the delegation of such duties. It is reasonable also, however, to regard the phrase "to execute the functions" as having the same general meaning as "for the administration of the functions vested in him by this title" which occurs in the same paragraph. If so, while it may well contemplate the delegation of authority to perform many acts requiring the exercise of discretion in the course of the administration of the functions vested in the Secretary, it does not provide a satisfactory basis for the delegation by the Secretary of those functions which are in terms confided to him, and which may be assumed to require the exercise of his personal discretion and judgment. Whether the language of Section 10(a) would permit the delegation of authority now proposed I do not find it necessary to decide, since, in addition to the fact that 10(a) is apparently limited in its application to the personnel within the Agricultural Adjustment Administration, there are other specific provisions of the Act, which, in my opinion preclude the delegation of authority to allot the quota for Puerto Rico.

Paragraph (A) (ii) not only provides that such allotment may be made by the Secretary, but that it may be made "by orders or regulations." Section 8a (4) prescribes a criminal penalty for any violation of "any order or regulation of the Secretary of Agriculture issued under this section" and (5) provides for forfeitures, recoverable by the United States in a civil suit, for exceeding any quota or allotment fixed by the Secretary. Orders and regulations are therefore placed upon the same footing and, if validly issued, become a part of the law and have the same force and effect as if incorporated in the statute. U. S. v. Grimaud, 220 U.S. 506 (1911). In authorizing the Secretary to issue such orders and regulations Congress is "merely

conferring administrative functions upon an agent," Ibid, at 516. But, if the function is administrative, it is one calling for a high degree of discretion, in the exercise of which the Congress may well have relied upon the personal judgment of the Secretary. In 35 Op. Atty. Gen. 15, the question of the authority of the Secretary of the Treasury, under various statutes, to delegate to subordinates duties imposed upon him by the Congress was carefully considered, with particular reference to statutes authorizing the Secretary to prescribe rules and regulations for the enforcement of the customs laws. It was there stated: (pp. 20-21)

"The making of regulations of this kind designed to have the force of law, to be binding upon the public, and to be recognized and enforced by the courts is, I think, a duty which the statutes place upon the Secretary personally. Wherever, therefore, in the provisions of law mentioned in your letter, and to which I have hereinbefore referred, a power and duty to make regulations of this kind is conferred or imposed upon the Secretary I think those regulations should have his personal approval before they are promulgated."

Definite indication is afforded in Section 8a (1) (A) itself that the Congress did not intend to authorize the Secretary to delegate his authority to allot the quotas for Hawaii and Puerto Rico. Paragraph (A) (i) which makes provision for the quotas for the various outlying areas (other than Puerto Rico and Hawaii) provides specifically that the Secretary

"may allot (or appoint an officer, including the Governor General of the Philippine Islands for that area, in his name to allot) any quota,"

The use of the alternative "or" is a clear indication that the term "may allot" was deemed not to include within itself authority "to appoint an officer . . . to allot." Further indication that allotment is not to be regarded as a delegable function appears from the fact that the officer who may be appointed by the Secretary is to make the allotment "in his name," and hence is to act, for the purpose of the allotment, not merely as an agent but as standing in the position of the Secretary himself. The authority to be exercised by the allotting officer, is therefore not that of a mere subordinate, performing duties which, whether of a ministerial or discretionary character, are delegated to him by a superior officer, but is derived, upon his appointment, from the statute itself and is of the same dignity and character as that of the Secretary himself, in whose name, in fact, it is to be exercised.



Finally, the fact that Congress has specifically provided that the Secretary may appoint an officer to allot the quotas for the outlying areas enumerated in (A) (i), and has specified that the Governor General of the Philippine Islands may be designated to allot the quota for that particular area, and the absence of any similar language in (A) (ii), shows clearly that there was no intent to provide for similar appointees to make the allotments for Puerto Rico and the Territory of Hawaii. It is our conclusion that the distinction thus made by Congress, coupled with construction of the terms employed in (A) (ii), taking into consideration the nature of the authority involved and recognized principles governing the delegation of duties of a discretionary nature, precludes the appointment of the Governor of Puerto Rico to allot the quota fixed for that area.

Francis M. Shea,  
Chief, Brief and Opinion Section,  
Office of General Counsel.



No. 45

POWER TO ENFORCE PERFORMANCE BY  
TRUSTEES OF PARTIES TO REDUCTION  
CONTRACTS

The Secretary of Agriculture may enforce performance by parties designated in benefit contracts entered into by the Secretary under the Agricultural Adjustment Act to receive and distribute benefit payments to contract signers, share tenants and share croppers.

The reservation in such a contract of the power to enforce performance makes clearer the right of the Secretary to enforce performance, but does not add to his powers or impose any additional obligation upon him.



June 4, 1934.

MEMORANDUM TO MR. MOYER

Pursuant to your request, I submit herewith an opinion upon the following:

QUESTIONS

1. Does the Secretary of Agriculture have the power to enforce performance by parties designated in many of the benefit contracts to receive and distribute benefit payments to contract signers, share-tenants, and share-croppers?
2. Does the reservation in such a contract of a power to enforce performance add to the Secretary's powers or impose any additional obligations on him?

OPINION

1. The Secretary of Agriculture may enforce performance by the parties designated as trustees.
2. The reservation in the contract makes clearer the right of the Secretary to enforce performance without thereby imposing additional obligations on him.

STATEMENT OF FACTS

In a number of the benefit contracts issued pursuant to the Agricultural Adjustment Act, provision is made that payments shall be made to the producer or cash tenant, if designated as trustee (or to such other person as may be designated as trustee) by the producer and such share-tenants and share-croppers on the farm as have at the time of such designation an interest in the crop to be produced on the farm. The designation is to be on forms approved by the Secretary. The benefit contracts further provide that the trustee shall distribute the payments to those so designating him as trustee in the same proportion as their respective interests, which proportion is to be specified in the designation of trustee by each person signing the same according to his interest. Moreover, a number of the contracts provide that the trustee shall be responsible as trustee to the Secretary to see that distribution is so made, it being expressly understood and agreed that the Secretary shall have no duty or obligation to see that distribution is so made but that the Secretary shall have the right to enforce performance of said trust by the trustee.

1. The Secretary of Agriculture as donor of a trust may enforce performance by the designated trustees.

It is a well-settled principle that a trust is created where property is given to one party who promises to deliver that specific property or its proceeds to a third party. McKee v. Lamon, 159 U. S. 317 (1895); City of Miami v. First National Bank of St. Petersburg, 58 Fed. (2d) 561 (1932); Re Interborough Consolidated Corporation, 288 Fed. 334 (1923). The latter case stated the rule in these words:

"If A. places money in the hands of B., to be delivered to C., a trust arises in favor of the latter. The acceptance of the money with notice of its ultimate destination creates a duty on the part of B. to devote it to the purpose intended, and a court of equity will enforce the trust. McKee v. Lamon, 159 U.S. 317, 322, 16 Sup. Ct. 11, 40 L. Ed. 165." (at 347)

The rule's applicability is not limited by the absence of an express promise by the recipient of the property to transfer it. McKee v. Lamon, *supra*; Heitman v. Cutting, 174 Pac. 675 (1918).

The existence of a trust is, of course, dependent upon the presence of a trust res. The designated party must not assume merely a personal obligation to make payments to the beneficiaries named in the benefit contracts. However, the existence of a trust is apparent under the instant facts. The benefit contracts provide that checks are to be paid to designated parties who are in turn to make proper distribution to those entitled to benefit payments. The acceptance of the checks by a designated party is clearly an acceptance in accord with the terms set out in the benefit contracts, namely, to make proportionate payment to interested persons. Moreover, it is clearly the intention that the specific proceeds from the checks are to be paid over to the beneficiaries without the parties being forced to rely solely upon the personal obligations of the recipients of the checks. The wording of the contracts to the effect that the trustees "shall distribute the payments" is conducive to this conclusion.

More difficult is the question whether the Secretary of Agriculture as donor of the trust has the power to enforce performance by the trustee. Such a power, however, apparently exists in the Secretary in the instant case. There is authority to the effect that where the creator or donor of a trust has parted with his entire interest in the property, he has no standing in a court of equity to compel performance of the trust. O'Hara v. Grand Lodge, I. O. G. T. of State of California, 213 Cal. 131, 2 P. (2d) 21 (1931). However, a number of cases have, at least by way of dictum, recognized a power in the donor of a trust to compel the carrying out of <sup>the</sup> terms thereof apart from the retention of any interest in the property. Carr v. Carr, 185 Iowa 1205, 171 N.W. 785 (1919); Andrews v. Hurt, 14 Ky. L. R. 765; Matter of Sill's Estate, 41 Misc. 270, 84 N. Y. S. 213



(1903). The adoption of the narrower rule would not limit the Secretary's power of enforcement under the present facts, since he has a sufficient interest to escape its restrictive force. The cases requiring a donor of a trust to have an "interest" in order to enforce a trust seemingly refer to a property or pecuniary interest. However, it is well established that the Government in seeking the aid of a court of equity need not have a property or pecuniary interest; the interest of the United States, derived from its duty to protect the public interest, being ample to support its resort to equity. In re Debs, 158 U. S. 564 (1895); United States v. Bell Telephone Company, 128 U. S. 315 (1888). Such a rule would appear applicable where the Government or its agent, the Secretary of Agriculture, seeks to enforce a trust. That there is sufficient public interest involved seems clear. The Agricultural Adjustment Act was designed as a measure to meet a national economic emergency. Important among its provisions is Section 8 (1) vesting in the Secretary of Agriculture the power "to provide for rental and benefit payments". Any act hindering the Secretary in the proper or orderly execution of his power under this Section clearly impairs the Governmental program for agricultural readjustment. Additionally, it should be noted that the contract payments are in the nature of bounties, the Government's control of which has long been recognized. United States v. Hall, 98 U. S. 343 (1878); Frisbie v. United States, 157 U. S. 160 (1895).

That the parties to whom the payments are ultimately due have an adequate remedy at law against the designated trustee may be advanced as an argument against the right of the Secretary to enforce performance. Such a right in the beneficiaries, however, does not protect the interests of the United States. Furthermore, the rule which limits the jurisdiction of equity to cases where there is no adequate remedy at law does not apply to an equity court in the establishment and enforcement of a trust. Bean v. Stoddard, 2 F (2d) 62 (1923); Lupton v. American Wholesale Corporation Baltimore Bargain House, 143 Md. 333, 122 A. 315 (1923)

2. The reservation in the contract of a power to enforce the trust makes clearer the Secretary's right without thereby imposing additional obligations on him.

The fact that a donor, in creating a trust, makes certain reservations, does not in itself affect the validity of the declaration, Davis v. Rossi, 326 Mo. 911, 34 S. W. (2d) 8 (1930). Thus, the donor may reserve to himself the right to use the corpus. Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925). Moreover, the donor may reserve the right to supervise the trust property in the hands of the trustee. In re Soulard, 141 Mo. 642, 43 S. W. 617 (1897); In re Barber's Estate, 304 Pa. 235, 155 A. 565 (1931). Reservation may also be made of the power to substitute a new trustee. In re Barber's Estate, supra. Considerations validating the reservations

in the Soulard and Barber's Estate cases apply with equal force to the reservation of a power to enforce the trust, the objective of the reservations in each instance being the effective execution of the trust rather than the retention of any title in the donor.

The reservation of a power to enforce performance of a trust must necessarily be a part of the declaration of the trust. Since the trust is here declared at the time of the acceptance of a benefit check by the designated trustee, the reservation in the benefit contract is not in itself a part of the trust agreement. However, the designated party receives the benefit check with a knowledge of the terms of such contract. These terms, therefore, reasonably become incorporated into the trust agreement between the Secretary of Agriculture and the designated trustee.

The reservation by the Secretary of Agriculture does not impose any additional obligation on him. It may be argued that the reservation of a power to enforce performance makes the Secretary a guarantor that the designated trustee will make payments to the parties. However, since the benefit contracts explicitly declare that it is "expressly understood and agreed that the Secretary shall have no duty or obligation to see that distribution is so made", the ultimate recipients of the payments clearly have no claim against the Secretary if he fails to take action for the enforcement of payment to them.

3. The transfer of a benefit check to the designated person and an acceptance thereof by him creates a third party beneficiary contract vesting in the Secretary of Agriculture, as promisee, a power to enforce performance.

Although the right of the Secretary of Agriculture to enforce performance may apparently be based on trust principles, all the requisites of a third party beneficiary contract are present under the instant facts. The transfer of the benefit checks by the Secretary to the designated party is sufficient consideration for the implied promise to pay the proceeds over to the landlord, tenants, and share-croppers. It is well settled that the consideration to support a promise need not inure to the promisor; it is sufficient if it consists in a detriment to the promisee. State v. Lum, 95 Conn. 199, 111 A. 190 (1920); Wit v. Commercial Hotel Co., 233 Mass. 564, 149 N. E. 609 (1925). Since there exists a valid contract, the Secretary of Agriculture, the promisee, would seem to have the power to bring an action in equity for specific performance on behalf of the beneficiaries. See: I Williston, Contracts, (1921 Edition), Sec. 358, p. 684.

Francis M. Shea,  
Chief, Brief and Opinion Section,  
Office of the General Counsel.

No. 46

STATUS OF SIGNERS OF MARKETING AGREEMENT

The promises of the signers of the Marketing Agreement for Gum Turpentine and Gum Rosin Processors are not mutually dependent; the possible invalidity of the Agreement as to certain signers would therefore not operate to release others from their obligations thereunder.





June 5, 1934.

MEMORANDUM TO MR. OPPENHEIMER

Re: Marketing Agreement for Gum Turpentine and Gum Rosin Processors (M.A. Series No. 36)

This is in reply to your memorandum of June 4th.

As I understand the situation, doubt has arisen as to the status of certain signers of the above agreement on the ground that their business is not such as (1) to qualify them to become parties to a marketing Agreement under the provisions of the Agricultural Adjustment Act as in force on the effective date of the agreement, or (2) to constitute them "processors" within the meaning of that term as employed in the agreement itself. No opinion is requested at this time on the status of such signers, but we are asked to advise upon a question which may be stated in the following terms:

QUESTION

Assuming that certain signers of the Marketing Agreement are not bound by its terms, is the Agreement, nevertheless, binding as to others?

OPINION

Since the promises of the signers are not mutually dependent, the invalidity of the Agreement as to certain signers does not operate to release others from their obligations thereunder.

Discussion

The parties to the Agreement consist of the offeror, members of the industry on the one hand, and of the acceptor, Secretary of Agriculture, on the other.

In the making of the offer to the Secretary no limitation was reserved conditioning its effectiveness upon the number of those joining in the offer, or upon their eligibility to enter into an Agreement of this character.

It is provided in Article XII that

"This agreement may be executed in multiple counterparts, which when signed by the Secretary shall constitute, when taken together, one and the same instrument as if all such signatures were contained in one original."

Thus the number of persons who might join in making the offer was left wholly indefinite. Furthermore, provision is made in Article XIII for the addition of new parties after the effective date of the Agreement. It is provided that "any processor" may become a party upon signing a counterpart of the Agreement which is to become effective "at such time as the Secretary may declare above his signature attached to such counterpart."

The obligations of performance undertaken by the signers are individual in character and not mutually dependent. Thus by Article III "each contracting processor" agrees to comply with marketing quotas. By Article IV "each contracting processor" agrees to pay his share of the expense of administering the Agreement. Article V provides that "contracting processors shall severally" furnish certain information and keep certain records. By Article VII "each contracting processor" applies for licensing. Only in Article VIII is there a departure from this terminology. By the terms of this Article "contracting processors agree" not to sell products from crude gum produced by certain wasteful methods. Although this undertaking is not expressly made individual or several, it is not to be assumed that a several or joint liability for the entire performance of this obligation was undertaken by any signer.

That the obligations of any of the parties signatory are wholly independent of the obligations of any other is conclusively shown by the provisions made for termination. Article X (b) provides that:

"The Secretary may at any time terminate this agreement as to any party signatory thereto, by giving at least one day's notice, by depositing the same in the mail and addressed to such party at his last known address."

Such termination of the Agreement as to any party signatory does not operate to release the others from their obligations. The only means provided by the Agreement by which signers can compel a termination is provided in Article X (c) to the effect that the Secretary shall terminate the Agreement "upon the request of 70 percent of the contracting processors." Since the obligations assumed by the signers of the Agreement are mutually independent, the mere fact that the act of signing may be nugatory as to certain signers, either because not eligible to enter into such an Agreement or because not embraced within its terms, cannot serve to release others from their obligations thereunder.

Francis M. Shea,  
Chief of Brief and Opinion Section,  
Office of the General Counsel.

No. 47

BASIS OF SUGAR QUOTAS UNDER  
AGRICULTURAL ADJUSTMENT ACT, AS  
AMENDED

The sugar quotas provided for by the Agricultural Adjustment Act, as amended, are quotas based upon the place of production; sugar produced in Cuba and refined in Puerto Rico for consumption in the United States is therefore within the Cuban quota.

Opinion Section Memorandum No. 83  
Dated June 7, 1934.





June 7, 1934.

MEMORANDUM TO MR. GILCHRIST

In reply to your memorandum of June 5, I submit my opinion upon the following:

QUESTION

Is sugar produced in Cuba, and refined in Puerto Rico for consumption in the United States chargeable to the quota for Cuba?

OPINION

The sugar quotas provided for by the Agricultural Adjustment Act, as amended, are quotas based upon the place of production; sugar produced in Cuba and refined in Puerto Rico for consumption in the United States is therefore within the Cuban quota.

Pertinent Provisions of the Agricultural Adjustment Act as Amended by the Jones-Costigan Act of May 9, 1934.

Section 8a(1) (A) (i) provides:

"Forbid processors, handlers of sugar, and others from importing sugar into continental United States for consumption, or which shall be consumed, therein, and/or from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable, for consumption in continental United States, sugar from the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, the Island of Guam, and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein, during such three years, respectively,

in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative respective three years, adjusted, together with the quotas established pursuant to paragraph (ii), (in such manner as the Secretary shall determine) to the remainder of the total estimated consumption requirements of sugar for continental United States, determined pursuant to subsection (2) of this section, after deducting therefrom the quotas for continental United States, provided for by paragraph (B) of this subsection: Provided, however, That in such quotas there may be included, in the case of the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, and the Island of Guam, direct-consumption sugar up to an amount not exceeding the respective quantities of direct-consumption sugar therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein during the year 1931, 1932, or 1933, whichever is greater, and in the case of Cuba, direct-consumption sugar up to an amount not exceeding 22 per centum of the quota established for Cuba; And provided further, That any imported sugar, with respect to which a drawback of duty is allowed, under the provisions of section 313 of the Tariff Act of 1930, shall not be charged against the quota established by the Secretary of Agriculture hereunder for the country from which such sugar was imported, and the Secretary of Agriculture may, by orders or regulations, readjust any quota subject to the provisions of this section, except quotas fixed by paragraph (B) of this subsection; and may allot (or appoint an officer, including the Governor General of the Philippine Islands for that area, in his name to allot) any quota, and readjust any such allotment, from time to time, among the processors, handlers of sugar and others; and/or"

Section 8a (1) (A) (ii) provides:

"Forbid processors, handlers of sugar, and others from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in the Territory of Hawaii or Puerto Rico for consumption in continental United States, sugar from the Territory of Hawaii or Puerto Rico, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into continental United States for consumption, or which was actually consumed, therein during such three years, respectively, in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from

time to time, determine to be the most representative respective three years, adjusted, together with the quotas established pursuant to paragraph (i), (in such manner as the Secretary shall determine) to the remainder of the total estimated consumption requirements of sugar for continental United States, determined pursuant to subsection (2) of this section, after deducting therefrom the quotas for continental United States, provided for by paragraph (B) of this subsection: Provided, however, That in such quotas there may be included direct-consumption sugar up to an amount not exceeding the respective quantities of direct-consumption sugar therefrom brought into continental United States for consumption, or which was actually consumed, therein during the year 1931, 1932, or 1933, whichever is greater, and the Secretary of Agriculture may, by orders or regulations, allot such quotas and readjust any such allotment, from time to time, among the processors, handlers of sugar, and others; and/or"

#### DISCUSSION

The question is in effect limited to determining whether sugar originating in Cuba, processed in, and entering continental United States from Puerto Rico, is sugar "from Cuba" so as to be included within the quota for Cuba provided for in Section 8a (1) (A) (i), or sugar "from Puerto Rico" so as to fall within the quota for Puerto Rico provided for in Section 8a (1) (A) (ii).

Before proceeding to an examination of the terms of these particular paragraphs, attention is directed to certain preliminary conclusions, resting upon consideration of the general plan of the Jones-Costigan Act, which may furnish a guide to a consistent and workable construction.

(1)

The quotas were intended to be mutually exclusive.

Section 8a makes comprehensive provision for quotas covering the United States, its territories, insular possessions and foreign countries. These quotas are to be based upon the "consumption requirements of sugar for continental United States" and are to be currently adjusted by the Secretary to meet "the actual requirements of the consumer." Section 8a (2) (A). In the event that the available statistics indicate that consumption requirements will exceed or fall below the amount previously determined, quotas are to be increased or decreased on a pro-rata basis, except that no deduction can be made from quotas fixed for continental United States by the Act.



(2) (B) (C). The quotas for all outlying areas are to be determined on the basis of "average quantities therefrom brought into or imported into continental United States" over a specified period, adjusted in such a manner as the Secretary shall determine to "the remainder of the total estimated consumption requirements of sugar for continental United States," after deducting therefrom the quotas for continental United States. (1) (A) (i) and (ii).

It is thus apparent that the quota scheme is one of permitted relative contributions to a total quantity of sugar which is required for consumption in continental United States, a scheme, therefore, which will be impaired if there is an overlapping of the quotas given to the various areas, since such overlapping would reduce the amount of sugar available in continental United States. We are thus led to the preliminary conclusion that sugar grown in one such outlying area and processed in another should not be deemed chargeable to the quotas for both such areas, unless the language of the Act compels such conclusion.

(2)

A careful analysis of Section 8a (1) (A) (i) will demonstrate that sugar brought into the United States is chargeable to the quota of the territory of origin rather than the territory of immediate shipment to the United States

The paragraph in question authorizes the Secretary to "Forbid processors, handlers of sugar, and others" from bringing into the United States for consumption therein "sugar from the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, the Island of Guam, and from foreign countries, including Cuba, \* \* \*." It also authorizes the Secretary to forbid processors, etc., "from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable," sugar from the above-specified territories. In interpreting these provisions which have reference to "sugar from" the specified territories the possibility is suggested of two diverse meanings which may be given the word "from", viz: that sugar from the specified territories means (1) sugar originating in such territories (i.e. sugar produced in such territories), (2) sugar shipped from the specified territories to the United States regardless of origin. The second suggested interpretation will not square with the context. Suppose the Act to be made applicable to Guam. Clearly, the Secretary is authorized to prohibit the processing in Guam, for consumption in the United States, of sugar from any of the specified territories. In that case, therefore, as Guam would be the point of immediate shipment to the United States "sugar from" the specified territories must mean sugar originating therein and not sugar immediately shipped therefrom. It would seem therefore to be established that for purposes of the prohibition against bringing into the United States



sugar identified with particular territories the identification runs to the country of origin and not the place of immediate shipment to the United States. This prohibition, however, is not absolute but qualified, i. e., it forbids not the importation of any sugar from the specified territories but only sugar from such territories "in excess of quotas \* \* \* based on average quantities therefrom brought into \* \* \* United States \* \* \* during" a base period. In this language we are again confronted with the possibility of alternative constructions, to wit, (1) that the sugar must be covered by the quota of the country of origin, or (2) by the quota of the country from which shipped. Again it is demonstrable that the second alternative cannot be sustained in the present context. In the first place there is here an immediate repetition of phraseology, viz., "sugar from the Virgin Islands," etc., and "quantities (of sugar) therefrom." Presumably the ellipses in the phrase when repeated are to be supplied with the same content as they had when originally used, that is to say, "quantities" must refer to sugar and "therefrom" to the previously specified territories. Moreover, the specified territories afford the only acceptable antecedent. The possible antecedents are (1) the United States, (2) any area to which the provisions of the title may be made applicable, and (3) the specified territories. Obviously the United States cannot be the antecedent, and the sentence structure requires that if any area "to which the \* \* \* title \* \* \* may be made applicable" is taken as the antecedent it must be so taken together with the United States because the prohibition is against dealing with sugar identified with the specified territories in certain ways with reference to the United States or to areas to which the Act may be made applicable. It is, therefore, concluded that the antecedent cannot be "any area to which the \* \* \* title \* \* \* may be made applicable". This compels the interpretation that the quotas referred to are quotas for the specified territories, and not for the areas to which the title may be made applicable. Suppose again that the Act be made applicable to Guam and that sugar originating in the Philippine Islands be processed in Guam and shipped to the United States it would, under this necessary interpretation, be required to come within the quota for the Philippine Islands and not the quota for Guam.

This argument is a precise answer to the case of sugar originating in Cuba, being processed in Puerto Rico, and shipped to the United States if the phrase "any area to which the \* \* \* title \* \* \* may be made applicable" means any area to which the title is applicable. Under Section 10 (f) of the Agricultural Adjustment Act the title is applicable to Puerto Rico. Hence, Section 8a (1) (A) (i) under the foregoing interpretation, would forbid processors, etc., from processing in Puerto Rico (being one of the areas to which the provisions of the title may be made applicable), sugar from Cuba (being one of the specified territories) in excess of the Cuban quota.

That the phrase "any area to which the provisions of this title \* \* \* may be made applicable" means "any area to which the title is applicable" may be satisfactorily established. The only

legislative history bearing on the point is found in Report No. 733 of the Senate Committee on Finance accompanying H. R. 8861. Referring to the Senate amendment which incorporated the provision in question, the report states "This amendment \* \* \* extends the provisions of paragraph 8a (1) (A) (i) to the processing of sugar in any area to which the Act applies, for consumption in continental United States \* \* \*". Moreover, the entire scheme of the Act compels this interpretation. It is clear that the Congress wished to control the processing of sugar in United States and the other territories to which the Act extended. Section 8a (1) (A) (i) under any suggested interpretation covers processing in the United States and the territories to which the Act may be made applicable with the possible exception of the territory of Hawaii and Puerto Rico. Section 8a (1) (A) (ii) controls the processing in the Territory of Hawaii and Puerto Rico of sugar originating in either of those two areas ("from" by the same course of reasoning as that carried out above will have the same meaning in 8a (1) (A) (ii) as in 8a (1) (A) (i)). The result therefore of not construing "any area to which the \* \* \* title \* \* \* may be made applicable" as meaning "any area to which the title is applicable" would be to leave uncontrolled the processing in the Territory of Hawaii or Puerto Rico of sugar from the Virgin Islands, the Philippine Islands, etc. It is impossible to rationalize such an exception.

However, even if it be determined that "may be made applicable" means "may be made applicable subsequent to the passage of the Act" the argument is still conclusive that sugar brought into the United States must be covered by quotas of the territory of origin. If it be established that "quotas" are fixed with reference to the production of sugar in an area and not with reference to the shipments therefrom, the conclusion would appear inevitable that sugar coming into the United States must be covered by the quotas of the territory of origin. It has already been established in the foregoing argument that under section 8a (1) (A) (i) the quotas are fixed for the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, the Island of Guam, and foreign countries, including Cuba, and only for these areas. Sugar from these territories, i.e., sugar originating in these territories, must, therefore, be brought within quotas for these territories as these are the only quotas fixed by the paragraph. In other words, sugar must be brought within the quota of the territory of origin regardless of the place from which immediately shipped to the United States.

An argument on the basis of section 8a (1) (A) (ii) affords an even clearer demonstration of the validity of this position. Quotas under that paragraph are fixed only for the Territory of Hawaii and Puerto Rico. Sugar brought into the United States from (i.e. sugar originating in) these two areas must be covered by quotas provided for in paragraph; to wit, quotas for the Territory of Hawaii and Puerto Rico. Conversely, these quotas are applicable



only to sugar originating in the Territory of Hawaii and Puerto Rico. Hence sugar produced elsewhere but coming to the United States immediately from one of these areas must be covered, if at all, by the quotas of the countries of origin.

(3)

An examination of other paragraphs of the Act affords further convincing evidence that quotas are to be fixed with reference to the producing area rather than with reference to the place of immediate shipment to the United States.

In so far as continental United States is concerned it is explicitly provided that quotas shall be based upon production. Paragraph (1) (B) authorizes the Secretary to forbid the marketing of

"sugar manufactured from sugar beets and/or sugarcane, produced in the continental United States beet-sugar-producing area," etc.

Quotas are to be determined for "any area producing" less than 250,000 tons of raw sugar value. (1) (C).

Other provisions, not limited to continental United States, point to quotas based upon production. Subsection (2) (D) provides that

"If, during any calendar year, any producing area is unable to produce and deliver its full quota of sugar, the Secretary of Agriculture may prorate this deficiency among the other areas on the basis of their respective quotas and ability to supply the deficiency."

It is clear from this paragraph that the quota for a territory is filled only by production in the area of the full amount of the quota.

There is a strong indication in paragraph (E) of subsection (2) that the basis of the quotas is the amount produced, rather than the amount processed or marketed in, or shipped from, the quota area. Deductions are to be made under this paragraph of "an amount for each year, respectively, representing the surplus stocks of sugar produced in that area, or a portion of the total surplus stocks of sugar produced in that area \* \* \* which may have accumulated in the year next preceding, over and above the quotas established for such year." This paragraph applies to outlying areas as well as to continental United States.

(4)

Quotas are to be fixed with due regard to the welfare of domestic producers, including Puerto Rican producers.

The Agricultural Adjustment Act as a whole is directed to restoring the purchasing power of the farmer through the adjustment of the production and consumption of agricultural commodities. The particular powers conferred upon the Secretary by Section 8a (1) are to be exercised "in order to effectuate the declared policy of this Act."

"having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers."

The Agricultural Adjustment Act is applicable to "the United States and its possessions," with specified exceptions, and therefore to Puerto Rico. Section 10 (f). It cannot be doubted, therefore, that the sugar quota for Puerto Rico should, so far as consistent with the terms of Section 8a, be established on terms favorable to the domestic producer.

Are Puerto Rican producers "domestic producers" within the meaning of the phrase, quoted above, "having due regard to the welfare of domestic producers?" It is our opinion that they must be so considered. Puerto Rico, while not incorporated into the territory of the United States so as to become a part thereof, is not foreign territory. De Lima v. Bidwell, 182 U. S. 1 (1901). Its position is recognized as analogous to that of a completely organized territory, such as Hawaii. See Kopel v. Bingham, 211 U. S. 468, 476 (1909). Congress has provided that the statutes of the United States, unless inapplicable, shall extend to Puerto Rico, 48 U.S.C.A. Section 734; and its permanent residents, with some exceptions, have been made citizens of the United States. 8 U.S.C.A. Section 5. It has been stated by the Supreme Court, in considering the status of Puerto Rico, that "no act is necessary to make it domestic territory if once it has been ceded to the United States." See De Lima v. Bidwell, 182 U. S. 1., 198 (1901). Accordingly trade with Puerto Rico is "properly a part of the domestic trade of the country since the treaty of annexation." See Haus v. New York S. S. Co., 182 U. S. 392, 397 (1901). Moreover, paragraph (A) (ii) places Puerto Rico on the same footing as Hawaii, which is certainly "domestic" territory, since it has been formally incorporated into and made a part of the United States.

It is plain that if the welfare of producers in Puerto Rico is to control, then the quota for Puerto Rico must be based upon produc-



tion. Otherwise, the amount of sugar grown in Puerto Rico which may be marketed or consumed in the United States will be decreased by every pound of sugar grown elsewhere which is re-shipped through Puerto Rico.

(5)

Sugar from Cuba which is processed in Puerto Rico and from there shipped into the United States should be deducted both from the Cuban quota and the amount of direct consumption sugar included in that quota.

Assuming it to be established that sugar produced in Cuba but processed in Puerto Rico and from there shipped into the United States should be deducted from the Cuban quota, there remains the question of whether it should be deducted also from the allotment of direct consumption sugar included in the Cuban quota. The possibilities remaining if the prior conclusions be accepted would be either (1) to charge the sugar against the Cuban quota and against the amount of direct consumption sugar included in the Cuban quota or (2) to charge it against Cuban quota but deduct it from the Puerto Rican allotment of direct consumption sugar though not deducting it from the Puerto Rican sugar quota. The latter interpretation is not a feasible one. The sugar must be charged against a quota. There are no separate quotas established for direct consumption sugar. Under the terms of the Act the quotas for sugar include a specified amount of direct consumption sugar. Therefore it would seem that if this sugar is to be charged off against any allotment of direct consumption sugar, it must be the allotment of direct consumption sugar included in quotas against which the deduction is made.

It is therefore concluded that sugar which has its point of origin in Cuba and is thereafter processed in Puerto Rico and from there brought into the United States is chargeable against the Cuban quota and may be deducted from the allotment of direct consumption sugar included in that quota.

Francis M. Shea,  
Chief of Brief and Opinion Section.



No. 48

RULES OF EVIDENCE IN ADMINISTRATIVE  
PROCEEDINGS

Evidentiary admissions or exclusions made in the course of a hearing upon a revocation of a license issued under Section 8(3) of the Agricultural Adjustment Act, will ordinarily not be disturbed, provided a full and fair hearing has been had.

Opinion Section Memorandum No. 125  
Dated June 7, 1934.





June 7, 1934

MEMORANDUM TO MR. BACHRACH

Re: Edgewater Dairy Company

QUESTION

Can the contention validly be made by a party to a hearing upon a revocation of his license that the presiding officer upon the hearing (a) erroneously excluded evidence from the record, and (b) admitted evidence which should have been excluded?

OPINION

The contention will ordinarily not be sustained on either ground, provided the party received a full and fair hearing.

DISCUSSION

I. Strict Jury Trial Rules of Evidence Are Not To Be Imposed In Hearings Before Administrative Bodies.

The instant problem involves the broad consideration as to what are the rules of evidence properly to be applied in hearings before administrative bodies.

Broadly, the rule is stated to be that even at common law, "the body of jury-trial laws of evidence does not, as such, control the inquiries made by administrative officials." Wigmore, Administrative Boards and Commissions--Are the Jury-trial Rules of Evidence in Force for their Inquiries, 17 Ill. Law Rev. 263. This rule has long and consistently been applied in hearings before all kinds of administrative bodies. It was enunciated as early as 1859 in the case of Spear v. Abbott, Fed. Cas. No. 13222, 22 Fed. Cas. 902, (Circ. Ct. D.C.), which was an appeal from a decision of the Commissioner of Patents. The appellant there claimed that depositions of certain witnesses should have been excluded on the grounds that they were improperly offered. But the court stated:

"The proceedings in the Patent Office in contested cases have no resemblance to trials at law."

And the Supreme Court stated in a case involving a hearing before the Interstate Commerce Commission, Interstate Commerce Comm. v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913):

"The Commission in an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties." (p. 93)

It has been pointed out that the rapid growth of government by administrative bodies makes such a rule a practical necessity, for the imposition of strict evidentiary requirements would hamper the very purpose of the existence of such bodies. See Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court, 35 Harvard Law Rev. 127 (1921). As the Supreme Court stated in Interstate Commerce Comm. v. Baird, 194 U.S. 25 (1903):

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof." (p. 44)

## II. The Admission, Therefore, of Incompetent Testimony Is Not Error.

Because of the less stringent requirements with reference to the taking of evidence on administrative hearings, it is clear that it is no valid ground for error that incompetent testimony has been admitted.

Thus, in Parsons v. Venzke, 4 N.D. 452, 61 N.W. 1036 (1894) an administrative hearing before the Federal Commissioner of the General Land Office was involved. The claim was made that error was committed by the Commissioner in accepting incompetent testimony. But the court refused to sustain this objection.

Likewise, in Ark. Wholesale Grocers Ass'n. v. Federal Trade Comm., 18 Fed. (2nd) 866 (C.C.A. 8th, 1927), cert. den., 275 U.S. 533, error was assigned because of alleged incompetency of testimony which was introduced at a hearing held by the Federal Trade Commission with reference to "unfair methods of competition." But the court refused to consider the contention, holding that "this assignment cannot be entertained." (p. 871).

To the same effect was the holding of the court in Hills Bros.

v. Federal Trade Comm., 9 Fed. (2nd) 481, (C.C.A. 9th, 1926); cert. den., 270 U.S. 662, - another case involving a hearing before the Federal Trade Commission. And in also refusing to sustain the objection of the appellant to the admission of certain testimony on the hearing, the court stated:

"Ordinarily the admission of incompetent testimony cannot be assigned as error \* \* \*." (p.484)

III. Nor Will Alleged Erroneous Exclusion of Testimony Ordinarily Be Considered As Error.

The same general rules apply to the alleged erroneous exclusion of testimony upon the administrative hearing.

In Lee Lung v. Patterson, 186 U.S. 168 (1902), an administrative immigration hearing before the Collector of Customs was involved. The Collector refused to consider certain certificates presented by the applicant for admission on the ground that these certificates were invalid. The applicant claimed error on the grounds that such certificates were not only proper evidence and erroneously excluded, but that a Federal statute even provided that they should be "prima facie" evidence for the purpose for which he offered them. But the court, per Justice McKenna, stated that the Collector had the right

"to pass on the evidence presented. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper." (p.176) (Underscoring supplied).

Likewise, in Brown Fence & Wire Co. v. Federal Trade Comm., 64 Fed. (2nd) 1934 (C.C.A. 6th, 1933), the appellant claimed error on the grounds that on the administrative hearing before the Federal Trade Commission with reference to alleged "unfair trade practices", certain evidence offered by it was erroneously excluded. It offered to prove by the catalogues of other business houses that 98% of its competitors used the same "unfair" practices, and that such practices were, therefore, the custom of the trade. The court noted that "this evidence was excluded by the Commission, and its ruling is assigned as error." (p. 925). But the court, however, not only held that the excluded evidence was for many reasons not conclusive, but that the rules to be applied with reference to administrative hearings precluded a reversal on that ground.

Likewise, in Hills Bros. v. Federal Trade Comm., 9 Fed. (2nd) 485 (C.C.A. 9th, 1926), cert. den., 270 U. S. 662, exclusion of testimony was also assigned as error. The offered testimony, again, was



to the effect that other concerns were also guilty of the same kind of alleged unfair methods of competition. "An objection to this class of testimony was sustained and the ruling is assigned as error." (pp. 484, 485). But here, also, the court considered the excluded testimony and held that "there was no error in the rulings complained of." (p. 485).

IV. The Test To Be Applied Is Not Whether Incompetent Testimony Was Admitted or Proper Evidence Excluded At The Hearing, But Whether There Is In the Record Substantial Evidence Sustaining the Findings of the Administrative Body.

If the findings of the administrative body are supported by, - in the usual words of the courts - "substantial" testimony, then the courts will not review the findings. The admission of alleged incompetent testimony or the erroneous exclusion of proper evidence will be considered as immaterial, and the findings as conclusive. As the court stated in Interstate Commerce Comm. v. Union Pac. R.R. Co., 222 U.S. 541 (1912), with reference to certain findings of the Interstate Commerce Commission:

"Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof - but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." (pp. 547, 548. Underscoring supplied)

Likewise, in Ark. Wholesale Grocers Ass'n. v. Federal Trade Comm., 18 Fed. (2nd) 866 (C.C.A. 8th, 1927), cert. den., 275 U.S. 533, the court stated:

"Error is assigned because of alleged incompetent testimony at the hearings. This assignment cannot be entertained provided there is any substantial competent testimony to support the findings." (p. 871)

Hills Bros. v. Federal Trade Comm., 9 Fed. (2nd) 485, (C.C.A. 9th, 1926), cert. den., 270 U. S. 662, was a case in which the petitioner claimed error on grounds both that erroneous testimony was admitted on the hearing, and on the grounds of improper exclusion of certain testimony. But the court stated, at page 484:

"Ordinarily the admission of incompetent testimony cannot be assigned as error in a proceeding of this kind, because the court is only concerned with the question whether there is any competent testimony to support the findings."



To the same effect, Moir v. Federal Trade Comm., 12 Fed. (2nd) 22 (C.C.A. 1st, 1926) ("any substantial evidence"); Cream of Wheat Co. v. Federal Trade Comm., 14 Fed. (2nd) 40 (C.C.A. 8th, 1926) ("substantial evidence"); Chamber of Commerce of Minneapolis v. Federal Trade Comm., 13 Fed. (2nd) 673 (C.C.A. 8th, 1926) ("substantial evidence").

Some holdings even indicate a more liberal ruling, - a mere requirement of "some" evidence to support the administrative body's finding. See Nat. Biscuit Co. v. Federal Trade Comm., 299 Fed. 733 (C.C.A. 2nd, 1924) at p. 735, cert. den., 266 U.S. 613. Or "any" evidence. Ind. Oak Co. v. Federal Trade Comm., 26 Fed. (2nd) 340 (C.C.A. 2nd, 1928), cert. den., 278 U.S. 623.

That the administrative body's findings of fact will ordinarily be accepted as conclusive does not, of course, preclude the court's examining in detail the record of the hearing. For the court must itself be satisfied as to the sufficiency of the evidence to support the administrative finding. In the words of Justice McReynolds in Federal Trade Comm. v. Curtis Pub. Co., 260 U.S. 568 (1923):

"Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive." (p.580)

And as the court stated in Guarantee Veterinary Co. v. Federal Trade Comm., 285 Fed. 853, (C.C.A. 2nd, 1922);

"We have, therefore, examined the transcript of record, which has been filed in this court, for the purpose of determining whether the testimony before the Commission supports the findings." (p.857)

And if the court finds no evidence whatsoever to support the administrative finding, then it will reverse. Int'l Shoe Co. v. Federal Trade Commission, 280 U.S. 291 (1929); Hauser v. Federal Trade Comm., 4 Fed. (2nd) 632 (C.C.A. 7th, 1925). But it has for some time been noted that

" \* \* \* the present tendency in the Supreme Court is more and more to limit the scope of judicial review of administrative action, \* \* \*." Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court, 35 Harvard Law Rev. 127 (1921) at p. 151.

V. Where the Statutes Involved Specifically Permit Broad Evidentiary Practice at the Administrative Hearings, There Can Be No Doubt As To the Validity of the Above Conclusions.

Many statutes creating administrative bodies specify the

evidential requirements. See Freund, Administrative Powers Over Persons and Property (1928), Secs. 39, 40.

"Furthermore, a declaration in the statute creating such officials, that their jurisdiction includes the power to make the rules of their own procedure is an implied sanction of their independence of the jury-trial rules and removes any possible common-law doubt." Wigmore, Administrative Boards and Commissions--Are the Jury-trial Rules of Evidence in Force for their Inquiries, 17 Ill. Law Rev. 263 (1922) at pp. 263, 264.

And the Agricultural Adjustment Act does so invest the Secretary of Agriculture, with the approval of the President, with power to make regulations which have the force and effect of law (Sec. 10(c)). And Section 211 of the Regulations (Series 3) in force with reference to such hearings pertaining to revocations of licenses specifically provides that:

"At any such hearing the presiding officer need not apply the technical rules of evidence."

Section 208 of these Regulations further provides:

"Such hearing shall be conducted in the manner to be determined by the presiding officer as will best conduce to the proper dispatch of business and the attainment of justice."

The Federal Trade Commission Act in like manner specifically provides that "the findings of the Commission as to facts, if supported by testimony, shall be conclusive." (15 U.S.C.A., Sec. 45, at p. 771). And the findings of the Interstate Commerce Commission as to reasonableness of rates are by statute made "prima facie" evidence. (49 U.S.C.A. Sec. 16). It has also been noted that under practically all Workmen's Compensation Statutes, the various commissions are given power "either to regulate the nature and extent of proofs and evidence and the method of taking and furnishing the same, or to adopt reasonable and proper rules to govern its procedure." See Comment, 29 Harvard Law Rev. 208, 209 (1915).

While these Agricultural Adjustment Act Regulations thus remove any doubt that the admission of incompetent testimony or the exclusion of proper testimony is not to be considered as error, yet they merely embody the accepted general rule with reference to evidence on administrative hearings. As the court stated in Chamber of Commerce of Minneapolis v. Federal Trade Comm., 280 Fed. 45 (C. C.A. 8th 1922):

"In all cases where Congress had lodged in administrative offices or boards power to find facts and make orders, such findings and orders are conclusive when supported by substantial legal evidence. The courts will not consider with nicety the weight of such evidence." (p. 48)

And as Justice Stone pointed out in Int'l Shoe Co. v. Federal Trade Comm., 280 U.S. 291 (1930), after referring to the Federal Trade Commission Act's requirement that the findings of the Trade Commission must be conclusive if supported by testimony:

"Even without such statutory limitation this court will not set aside the findings of an administrative board or commission \* \* \* unless the record establishes that clear and unmistakable error has been committed." (p. 303). (Underscoring supplied)

VI. Although Error Will Thus Not Ordinarily Be Sustained on Evidentiary Grounds, Yet The Rule Has Its Limitations In That the Administrative Procedure Must Come Up to the Minimum Requirements of a "Hearing".

The above represent the ordinary and general rules applied to evidence on administrative hearings. But it is conceivable, of course, that such gross error may be committed, - especially in the exclusion of testimony - as to call for a reversal. For instance, in Hills Bros. v. Federal Trade Comm., 9 Fed. (2nd) 481, (C.C.A. 9th, 1926) cert. den., 270 U. S. 662, in which both the admission of erroneous evidence and the alleged erroneous exclusion of evidence were cited as error, the court treated the erroneous admission of evidence much more lightly than the alleged exclusion. It considered the erroneous admission of evidence as quite immaterial provided there was other evidence in the record to sustain the Commission's findings, but it examined more closely what evidence was excluded. Other cases are also cited above in which the exclusion of testimony on administrative hearings has been disregarded, and the same rule generally applied as to the admission of incompetent testimony. But as Justice Stone stated in Int'l. Shoe Co. v. Federal Trade Comm., 280 U. S. 291 (1930), the administrative hearing will not be reviewed "unless the record establishes that clear and unmistakable error has been committed." (p. 303). Furthermore, in Brown Fence & Wire Co. v. Federal Trade Comm., 64 Fed. (2nd) 934 (C.C.A. 6th, 1933), although the court held that the exclusion of testimony would not there call for a reversal, it nevertheless also examined the testimony to see what it was that was excluded, as did the court in the Hills Bros. case. For while, ordinarily, matters of admission or exclusion of testimony on the administrative hearing will not be considered as grounds for reversal by the courts, and the strict rules of evidence



applied in the law courts will not be held to apply on such hearings, yet there cannot be a wholesale disregard of all evidentiary requirements. As the court stated in Interstate Commerce Comm. v. Louisville & Nashville R. R. Co., 227 U. S. 88 (1913), in which the Interstate Commerce Commission went so far as to claim that its order was conclusive even if the record did not show substantial evidence to support its findings:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of evidence';" (p. 91). (Underscoring supplied).

The court went on to further state:

"The Commission is an administrative body, and even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to admissibility of evidence, which prevail between suits of private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. \* \* \* All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." (p. 93) (Underscoring supplied).

The same considerations may also apply to a complete disregard of evidentiary considerations in basing findings wholly upon



incompetent testimony. In John Bene & Sons v. Federal Trade Comm., 299 Fed. 468 (C.C.A. 2nd, 1924), Justice Hough, in examining the record of the hearing, stated:

"If by evidence is meant testimonial matter legally competent, relevant, pertinent, and material, this record contains very little of that kind."  
(p. 469)

It appeared that unqualified witnesses were allowed to testify and the record contained unidentified evidence, and erroneous opinion evidence. The court noted:

"The questions suggested by the foregoing references are whether the Commission, in its investigations, is restricted to the taking of legally competent and relevant testimony. We incline to think that it is not by the statute, and, having regard to the exigencies of administrative law, that it should not be so restricted." (p. 471)

But the court went on further to hold that although legally incompetent evidence is admissible before administrative bodies, "it should be fairly done", and held the evidence there submitted "lacking in every evidential or testimonial element of value."

The court in the Arkansas Grocers' case, supra, likewise stated:

"Findings and orders of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing." (p. 871). (Underscoring supplied).

A case may well be imagined, for instance, where the exclusion of important testimony a party has to offer may go so far as to violate the requirement of the Supreme Court in the Louisville Railway case, supra, that a party must be permitted "to offer evidence", and so as to amount, - in the words of the court in the Arkansas Grocers' case, supra - "to a denial of the right to a fair hearing."

And in Parsons v. Venzke, 4 N.D. 452, 61 N.W. 1036 (1894), although the court rejected the claim that the Commissioner of the General Land Office accepted incompetent testimony on the hearing, it went on further to state:

"We must, however, not lose sight of the principle that the department must not act in any arbitrary manner, - must not deny any right to be heard. Should the rules of the department result in a denial of a hearing,-

the courts would restore the rights he had lost by such unfair procedure . . . ." (p. 1039)

(Cf. Farmers' Elevator Co. v. Chicago Ry. Co., 266 Ill. 567, 107 N. E. 841 (1915), in which the court held that ex parte investigations of an administrative body did not satisfy the statutory requirement of a "hearing", which "means the right to appear and give evidence.") It is thus true that while the courts will seldom review an administrative finding, they will review

"where there has been an improper procedure violating those principles of fairness and justice which satisfy the minimum of due process of law." Albertsworth, Judicial Review of Administrative Action, 35 Harvard Law Review 127 (1921) p. 151.

#### CONCLUSION

While the admission of incompetent testimony and the erroneous exclusion of proper evidence will not ordinarily be considered as error where there is other substantial evidence in the record to support the administrative finding, the rule, especially with reference to the exclusion of testimony, cannot be carried to the extreme of amounting to a party's denial of a full and fair hearing.

Francis M. Shea,  
Chief, Brief and Opinion Section.

No. 45

INCLUSION OF "SHORT PIMA" COTTON IN  
ALLOTMENTS UNDER BANKHEAD ACT

Under Section 25(c) of the Bankhead Act (as amended by Pub. Res. No. 45, 73d Cong.) all cotton produced in any state must be included in state production totals and county allotments under the Act. The special treatment accorded individual producers of short Pima, by the segregation of certificates to the extent of the short Pima average for division among them in 1934, would constitute a fair and just classification under Section 7(a)(3), the requirements of that provision being satisfied if all members of a reasonable category within any county are treated uniformly.

Opinion Section Memorandum No. 138  
Dated June 7, 1934.

See also Opinion of Attorney General  
Dated May 23, 1934, in the Appendix (A-5).





June 7, 1934.

MEMORANDUM TO MR. COBB

Dear Mr. Cobb:

Pursuant to your inquiry of May 14th, I reply as follows:

QUESTION

Under the Bankhead Act is it permissible to add the five-year weighted average of Pima cotton that was less than one and one-half inches in length to the five-year average for short staple cotton calculating State production totals and county allotments: and to hold in reserve the certificates to the extent of the "short Pima" total to be divided among those Pima growers whose cotton in 1934 is less than one and one-half inches in length?

OPINION

Under Section 25 (c) of the Bankhead Act (as amended by Pub. Res.-No. 45-73d Cong.) all cotton produced in any State must be included in State production totals and county allotments under the Bill. The special treatment accorded individual producers of short Pima by the segregation of certificates to the extent of the short Pima average for division among them in 1934 would constitute a fair and just classification under Section 7 (a)(3), the requirements of that provision being satisfied if all members of a reasonable category within any county are treated uniformly.

DISCUSSION

Public Resolution - No. 45 - 73d Congress amends the Bankhead Act by adding at the end thereof Section 25, subsection (c) of which provides:

"In computing the production of any State pursuant to section 5(a) the total production of cotton for such State in the five year period, 1928-1932, inclusive, shall be used regardless of the length of staple of such production."

Short Pima cotton must thus be added in in calculating States production totals under Section 5(a) and county allotments under Section 5(b).

In making allotments to individual producers under Section 7(a)(3) certificates to the extent of the five-year weighted average of Pima cotton that was less than one-and one-half inches in length may be segregated and held in reserve to be divided among those Pima growers whose cotton in 1934 is less than one and one-half inches in length. Section 7(a)(3) of the Act provides as follows:

"Section 7(a). The amount of cotton allotted to any county pursuant to section 5(b) shall be apportioned by the Secretary of Agriculture to farms on which cotton has been grown within such county. Such allotments to any farm shall be made upon application therefor and may be made by the Secretary based upon --

"(3) Upon such basis as the Secretary of Agriculture deems fair and just, and will apply to all farms to which the allotment is made under this paragraph uniformly, within the county, on the basis or classification adopted. The Secretary of Agriculture, in determining the manner of allotment to individual farmers, shall provide that the farmers who have voluntarily reduced their cotton acreage shall not be penalized in favor of those farmers who have not done so." (Italics supplied)

This provision permits the Secretary to make fair and just classifications in allotting certificates to individual producers, with the proviso that all producers within any category in any county be accorded uniform treatment. The reservation of certificates to the extent of the short Pima average for the base period to be divided among Pima growers whose cotton in 1934 is less than one and one-half inches in length meets the requirements of this Section. The establishment of such a reserve is clearly consonant with the equities of the situation. Short Pima cotton differs entirely in quality from ordinary short staple; it commands a higher price and is considerably more expensive to produce. In addition, its

appearance on long-staple farms is wholly fortuitous. In the event of a large crop of short Pima in the coming year, if no special provision is made for allotments to such cotton producers, short Pima growers could market but a negligible quantity without tax. Under the plan suggested the total number of certificates which would be segregated for distribution would in any case be small; moreover, it is stipulated that if the production of short Pima does not cover the number of exemption certificates reserved, these are to be used in allotments to ordinary cotton producers. It is therefore concluded that the plan recommended constitutes a fair and reasonable classification under Section 7(a)(3), and that it satisfies the requirement of uniformity laid down in that provision if all producers of short Pima within any county receive the same treatment under the scheme proposed.

It may be desired to protect against the contingency that unfavorable conditions during the crop year 1934-35 may result, as in 1932, in a large fraction of the Pima cotton crop running less than one and one-half inches in staple length. Reservation of certificates on the basis of the weighted average for the base period alone clearly would not protect Pima growers against such a contingency. However, it will be perfectly legitimate to allot exemption certificates to Pima farmers up to 15 or 20 percent of their expectable total production and provide that each certificate may only be issued against Pima cotton which is actually less than one and one-half inches in staple length. Such certificates as are not actually used may be distributed ratably to ordinary cotton growers. Such a procedure will be valid as long as the system adopted is uniform for all growers within each county. It will, of course, subject the ordinary growers to the risk that, if the Pima crop has an unusually high percentage of short staple cotton, their own allotments will be substantially reduced.

Telford Taylor,  
Acting Chief, Brief and Opinion Section,  
Office of the General Counsel.





No. 50

IMPORTATION OF DIRECT-CONSUMPTION SUGAR

The amount of direct-consumption sugar, not exceeding 22% of the quota established for Cuba, as provided by Section 8a(1)(A)(i) of the Agricultural Adjustment Act, is to be expressed in terms of short tons raw value sugar in the quota established under the Act.



June 9, 1934.

MEMORANDUM TO MR. GILCHRIST

I submit herewith my reply to your memorandum of May 28 requesting an interpretation of that portion of the first proviso in Section 8a(1) (A) (i) of the Jones-Costigan Sugar Bill which prescribes the amount of direct-consumption sugar which may be brought into or imported into continental United States from Cuba. The proviso reads:

"That in such quotas (i.e., total quotas for importing and bringing in of sugar) there may be included, in the case of the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, and the island of Guam, direct-consumption sugar up to an amount not exceeding the respective quantities of direct-consumption sugar therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein during the year 1931, 1932, or 1933, whichever is greater, and in the case of Cuba, direct-consumption sugar up to an amount not exceeding 22 per centum of the quota established for Cuba;" (*Italics ours*).

Your question can briefly be phrased thus: When 22 per centum of the number of tons in the quota established for Cuba has been ascertained, is the resultant number (a) the number of tons of actual deliveries or imports of direct-consumption sugar which can be made into the United States (which would set the raw value equivalent of the direct-consumption sugar at a figure higher than 22 per centum), or (b) the number of tons, in raw value sugar terms, of the direct-consumption sugar which can be delivered or imported into the United States? Alternative (a) supra, is identical with alternative proposal 2 of your memorandum of May 28 and (b) with alternative proposal 1.

Although several references to the legislative history indicate that alternative (a) would be more consistent with the legislative intent (see 78 Cong. Rec. 6168; 6187; 6189; House Hearings on H.R. 7907, 73d Congress, 2d Session, pages 175-176), the clear language of the statute indicates that alternative (b) must be adopted as the correct interpretation. The number obtained when 22 per centum is taken of the number of short tons raw value sugar constituting the full Cuban import quota is the raw value sugar equivalent of the amount of direct-consumption sugar that will be allowed to be imported from Cuba. Since the Statute specifies that 22 per centum of the quota established for Cuba is to be taken as the amount of direct-consumption sugar which may be imported



or brought into the United States from Cuba, and the total quota established for Cuba is set up in terms of short tons raw value sugar, the direct-consumption quota must necessarily also be in terms of short tons raw value sugar. Furthermore, the presence of the word "included" would seem to imply that equal units, (i.e., short tons raw value sugar) be used in both the including and included quantities. This construction is confirmed by section 9d(6) (G) of the Agricultural Adjustment Act, as amended, which reads in part that,

"All taxes shall be imposed and all quotas shall be established in terms of 'raw value' and for purposes of quota and tax measurements all sugar shall be translated into terms of 'raw value' according to regulations to be issued by the Secretary . . . . ."(Italics ours).

Taking the figures supplied in your memorandum of May 28, then, I conclude that the amount of direct-consumption sugar which is to be imported into the United States from Cuba is 418,000 short tons raw value sugar and is to be expressed as such in the quotas which are set up under the Act.

Francis M. Shea,  
Chief of the Brief and Opinion Section,  
Office of the General Counsel.





13288